

ORIGINAL

NO. 96-6133

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Supreme Court, U.S.
FILED

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WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, WARDEN,
PONTIAC CORRECTIONAL CENTER,

Respondent,

CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GILBERT H. LEVY
Suite 200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
206 443-0670

840P

CAPITAL CASE

QUESTIONS PRESENTED

1. The first question presented is whether there was a structural defect in the Petitioner's trial, giving rise to a presumption of prejudice, when the judge who presided was a racketeer involved in a pattern of taking bribes to fix criminal cases, including homicides.

2. The second question presented is whether a habeas corpus petitioner's right to an evidentiary hearing is subject to a higher standard when his constitutional claim is based on newly discovered evidence obtained too late to be presented to the state courts.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM BRACY, Petitioner,

v.

RICHARD GRAMLEY, Warden,
Pontiac Correctional Center, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner William Bracy, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the petition for a writ of habeas corpus.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Bracy v. Gramley, 81 F.3d 684 (7th Cir. 1996). The opinion of the District Court is reported as United States ex rel. Collins v. Wellborn, 868 F. Supp. 950 (N.D. Ill. 1994). The opinion of the Illinois Supreme Court affirming the denial of the petition for post conviction relief is reported as People v. Collins, 606 N.E.2d 1137 (Ill. 1992). The opinion of the Illinois Supreme Court on direct appeal

affirming the conviction is reported as People v. Collins, 478 N.E.2d 267 (Ill. 1985).

II.

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was entered on April 12, 1996. The Petition for Rehearing and Suggestion for Rehearing en banc was denied on June 26, 1996. This petition is timely filed within ninety days of that date. This Court's certiorari jurisdiction is invoked pursuant to Title 28 United States Code § 1254(1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

. . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws.

IV.

STATEMENT OF FACTS

A. Facts Relevant to Conviction and Sentence

The Petitioner, his co-defendant, Roger Collins, and another individual, Murray Hooper, were indicted for armed robbery and murder of Frederick Lacy, R.C. Pettigrew, and Richard Holliman. Hooper was tried separately. The State presented evidence that on November 12, 1980, Lacy, Pettigrew and Holliman were taken from an apartment at 2240 South State Street in Chicago, driven to a viaduct at Roosevelt Road and Clark Street, and shot to death. All

three were bound with rope and killed by shotgun blasts and gun shots.

The principal witness against Petitioner and Collins was an individual named Morris Nellum, who pleaded guilty to a reduced charge and was sentenced to a term of probation. Nellum testified that he went to the apartment at 2240 South State Street and observed Collins, Petitioner and Hooper in the company of three other individuals. These individuals were subsequently taken from the apartment and placed in a red Oldsmobile. Collins asked Nellum to follow them in a brown Cadillac. When Nellum arrived at the viaduct at Roosevelt and Clark, he heard shotgun blasts. He then saw Petitioner and Hooper get into Petitioner's car and Collins got into the Cadillac with Nellum and they all drove off. Petitioner was carrying a sawed-off shotgun. Later, Nellum accompanied Collins, who threw the two handguns into Lake Michigan.

Witnesses identified Collins and Bracy at the apartment building on South State Street in the company of other individuals, one of whom appeared to be bound. Another witness, Christina Nowell, testified that Bracy took a 38 caliber Charter Arms revolver from her and he later told her that he murdered some people and threw her hand gun in the Chicago River. A Charter Arms revolver and a 357 Ruger handgun were recovered from Lake Michigan by police divers, after they were led there by Nellum in July, 1981. The guns were too rusty to allow for an exact ballistics comparison. However, the serial number on the Charter Arms revolver was the same as the one that was registered to Nowell. Two pieces of rope

were found in the apartment at 2240 South State Street and they had the same characteristics as the rope which was used to bind the victims.

Both Petitioner and Collins presented alibi defenses. Petitioner called his sister, Barbara Harris, who testified that he had dinner with her and her husband on the evening of November 12, 1980. Collins called his girlfriend, Beatrice Mack, who testified that she and Mr. Collins spent the evening and afternoon together on November 12. Both Petitioner and Collins testified on their own behalf and other witnesses were called by the defense to discredit Morris Nellum and Christina Nowell.

The jury elected to disbelieve the defense witnesses and to believe Morris Nellum and returned guilty verdicts on all counts. In a separate sentencing proceeding, the Petitioner and Mr. Collins were sentenced to death.

B. Facts Relevant to Judicial Bias Claim

Thomas J. Maloney presided over the Petitioner's trial and sentenced him to death. The trial occurred in July, 1981. In the course of the trial, Judge Maloney made various discretionary rulings adverse to the Petitioner and his co defendant, including denial of a motion to suppress based upon an alleged illegal search, excusing the only African American prospective juror for cause over the Petitioner's objection, denial of a motion for mistrial based upon testimony that a witness for the State had been placed in protective custody, denial of a request for severance, refusal to give the Petitioner's proposed jury instructions,

refusal to grant a short continuance prior to the commencement of the penalty phase after Petitioner's counsel announced that he was unprepared, permitting the State to introduce evidence of an adjudicated double homicide in Arizona as non statutory aggravation evidence in the penalty phase, and permitting the Assistant State's Attorney to make arguments in the penalty phase which the Seventh Circuit characterized as improper but not prejudicial.

In support of his petition for habeas corpus, the Petitioner presented evidence that Thomas Maloney was a felony trial judge in the Cook County Circuit Court starting in 1976.¹ Prior to his ascension to the bench, Maloney was a criminal defense attorney who represented various organized crime figures in Chicago. In the course of his career as a defense lawyer, Maloney paid cash bribes to Cook County Judges in cases that he handled. In one instance, Maloney helped secure the acquittal of La Cosa Nostra hit man Harry Aleman on a homicide charge, by bribing the trial judge, Frank Wilson. Maloney himself was closely tied to La Cosa Nostra, and major organized crime figures looked forward to Judge Maloney's appointment as an opportunity to have a "good friend" on the bench.

Upon donning the black robe, Judge Maloney did not disappoint his associates. As a result of his activities on the bench, he was convicted of conspiracy, racketeering, extortion, and obstruction

¹ The evidence included the indictment in United States of America v. Thomas J. Maloney and Robert McGee, United States District Court for the Northern District of Illinois Cause Number 91-CR-477-1, and the Government's written proffer of aggravation evidence submitted in support of its position at former Judge Maloney's sentencing.

of justice. United States v. Maloney, 71 F.3d 645 (7th Cir. 1995). The predicate crimes that formed the basis of the RICO allegation included several instances in which Judge Maloney accepted bribes in return for not guilty verdicts or conviction on reduced charges. Three of these cases were homicide cases. The period of time covered by the conspiracy was the 1980 through 1990. In August, 1981, one month after the Petitioner's trial, Judge Maloney accepted a bribe to acquit organized crime defendants who were charged with homicide. The name of the case was People of the State of Illinois v. Lenny Chow et al., Cook County Circuit Court Cause number 80 C 4020. In two other instances, Maloney initially accepted money to fix murder trials, but then gave the money back in an effort to avoid suspicion, and proceeded to convict the defendants and sentence them to death² Maloney also attempted to persuade witnesses to refuse to cooperate with the investigation, and he tried to conceal the bribe money from the Internal Revenue Service.

There was also evidence that Judge Maloney was deliberately tough on defendants who did not bribe him. In her dissenting opinion in the Court of Appeals decision in this case, Judge Rovner made reference to the experience of William Swano, an attorney who bribed Maloney on other occasions, but who decided in one particular case that he would not offer a bribe because the evidence

² In one of these cases, People v. Earl Hawkins and Nathan Fields, Cook County Circuit Court Cause Numbers 85-C-6555 and 85-C-7691, the Cook County Circuit recently granted a new trial to the defendants. A copy of the opinion in that case is contained in the appendix to this brief.

favoring his client was strong.³ 81 F.3d 697. Contrary to expectations, Judge Maloney convicted Swano's client in this case, and Swano learned from the experience that, ". . . to practice in front of Judge Maloney . . . we had to pay." Id.

Petitioner requested that the District Court provide investigative resources and an opportunity for discovery to ascertain whether or not Judge Maloney's involvement with bribe taking had an impact on his decision making in those cases in which he did not receive bribes. The request for discovery was denied. The Seventh Circuit upheld the decision of the District Court dismissing the petition, holding that Petitioner was not prejudiced by Judge Maloney's pattern of misconduct. Chief Judge Posner, writing for the majority, concluded that Petitioner had demonstrated nothing more than an appearance of impropriety and held that discovery would be futile, since Petitioner could not hope to demonstrate Maloney was influenced in this particular case. 81 F.3d 690, 691. Petitioner's request for rehearing en banc was denied, although three judges voted to grant the request.

C. Facts Relevant to Newly Discovered Evidence Claim

In June of 1992, a private investigator working with Petitioner's present counsel, was able to locate Morris Nellum in Chicago, and he provided her with a tape-recorded statement over the telephone. While this statement related primarily to separate murder charges of which Petitioner had been convicted in Arizona,

³ This information was derived from the transcript of Judge Maloney's trial.

Nellum also provided information concerning his testimony at Petitioner's trial in Illinois. Nellum informed the investigator that contrary to his trial testimony, he was threatened by Chicago police officers with a sledge hammer and hit in the jaw by Detective O'Callaghan when he was arrested and gave his initial statement implicating Petitioner in the triple murder. He also denied seeing Roger Collins or the Petitioner lead the victims to their car in the parking lot at 2240 South State Street and he denied hearing any shots when he arrived at the overpass of Roosevelt and Clark Streets. Nellum also stated that his testimony in the Arizona case was totally false and that he had been coerced into giving false testimony by Cook County Assistant State's Attorney Greg Owen and Chicago Police Detective Hoke.

In July of 1992, Nellum provided a sworn court-reported statement to Petitioner's present counsel in Phoenix, Arizona. In this statement, Nellum repeated his claim that he was beaten by Detective O'Callaghan at the time of this arrest in Chicago, and stated that he also saw Petitioner being beaten by the Police in an adjoining interrogation room. The officers questioning Nellum implied that if he didn't cooperate he would get the same treatment as Petitioner. Nellum stated that he lied at Petitioner's trial when he testified that he saw Petitioner with a shotgun, that he lied in court when he testified that he saw Murray Hooper at Roosevelt and Clark, and that he was required to give false testimony as part of the deal to avoid his being charged with the murders. Assistant State's Attorney Greg Owen, one of the prosecutors at

Petitioner's trial, was the one that told Nellum to give false testimony about Hooper.

In April of 1993, Nellum appeared for a deposition in Phoenix in connection with Post-conviction proceedings in the Arizona homicide case. Shortly before the deposition, Nellum was taken into custody by Chicago police officers who questioned him about his recantation. At the deposition Nellum answered some of defense counsel's preliminary questions, and repeated his claim that he was punched in the face and threatened with a sledge hammer at the time of his original arrest. However, when the Arizona prosecutor and the Cook County Assistant State's Attorney who were present both reminded Nellum that he had stated he only wanted to talk in front of a judge, Nellum refused to answer any further questions, and the Arizona court that had ordered the deposition declined to compel him to cooperate.

The Petitioner requested leave to take Nellum's deposition in connection with his habeas corpus petition in Illinois. The District Court denied this request for a deposition and also declined to grant an evidentiary hearing on Petitioner's claim that his conviction was obtained through the State's knowing use of perjured testimony by Nellum. In affirming, the Court of Appeals held that Petitioner was not entitled to an evidentiary hearing because his claim was based on newly discovered evidence presented many years after his conviction became final and he failed to make the requisite showing that there was good reason to expect that a hearing would result in an order for a new trial. Id. 81 F.3d. 694.

V.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant the Writ on the Issue of Judicial Bias Because the Seventh Circuit Ignored Established Precedent in Declining to Grant Relief on this Claim

In Tumey v. Ohio, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927), this Court held that it violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case. The Court noted that the common law rule was that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving of the subject matter which he was to decide, rendered the decision voidable. Id. at 524. This Court stated, "There was at the common law the greatest sensitivity over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace." Id. at 525. Writing for the Court in Tumey, Chief Justice Taft noted that with only slight modification, the common law rule was embodied in the due process clause of the Fourteenth Amendment. Thus, he stated:

From this review we conclude, that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex.

Id. at 531

The Court went on to conclude:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532, (emphasis supplied).

The Court concluded in Tumey that the right to disqualify a judge, based upon pecuniary interest, existed regardless of the strength of the evidence against the accused. Id. at 535.

Following the decision in Tumey, this Court in In Re Murchison, 349 U.S. 133, 99 L. Ed 942, 75 S. Ct. 623 (1955), recognized that due process guarantees did not simply protect against actual bias, but that ". . . a possible temptation to the average man as judge . . .", would suffice. The Court stated:

Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between the contending parties. But to satisfy its high function in the best way "justice must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11, 14.

Id. at 136, (emphasis supplied).

The strict rule of Tumey and Murchison was applied in Aetna Life Insurance Company v. Lavoie, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985). There an Alabama Supreme Court judge was held to be disqualified to decide a case pending before him on appeal, where he was also a plaintiff in another case involving similar issues of law. This Court noted that it was not required to decide whether the Judge had actually been influenced since it was sufficient to determine that there was a "possible temptation".

Id. at 825. In reversing the State Court judgment, this Court stated:

Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Id. at 828, (emphasis supplied).

In Vasquez v. Hillary, 474 U.S. 254, 263, 88 L. Ed. 2d 598, 106 S.Ct. 617 (1986), this Court noted that when the judge has a possible interest in the proceeding, there arises a presumption of prejudice. The Court stated:

When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.

Id. at 263, (emphasis supplied).⁴

Several principals emerge from this line of cases. First, the strict common law rule requiring disqualification for the "slightest pecuniary interest" is embodied in the Due Process Clause of the Fourteenth Amendment. Second, under this rule there need not be a showing of actual bias, only a possible temptation to the average person as judge. Third, prejudice is presumed meaning that it is irrelevant whether or not there is sufficient evidence of guilt. Finally, there is language in both In Re Murchison, and

⁴ The presumption of prejudice that arises in instances of judicial bias is tantamount to those structural defects in the trial mechanism which defy harmless error analysis, such as that arising from denial of the right to counsel. Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).

Aetna Life suggesting that due process requires that there be an "appearance" of justice.⁵

This Court's decisions on judicial bias were applied by the Seventh Circuit in Del Vecchio v. Illinois Department of Corrections, 31 F.3d 1363 (7th Cir. 1994). The Court noted that Aetna and Murchison did not require disqualification based upon the "appearance of bias"; they simply held that there need not be actual bias against a particular party or cause. Id. at 1372. The Seventh Circuit stated that there must be "an actual incentive to find one way or another", and this meant a "strong, direct interest in the outcome of the case". Id. at 1372, 1373. Rejecting the "possible temptation" language of Tumey, the Court held that disqualification is only required when the biasing influence is so strong that it overcomes the presumption of "honesty and integrity of those serving as adjudicators". Id. at 1375.

In the decision in this case, the Seventh Circuit majority went even further in diluting the principals announced in Tumey, Murchison, and Aetna Life. In order to avoid the undesirable result of perhaps having to reverse a number of convictions, the

⁵ The Pennsylvania Supreme Court applied the appearance of fairness rule to reverse a number of criminal convictions in Interest of McFall, 617 A.2d 707 (Pa. 1992), where a trial judge was caught taking bribes and subsequently continued on the bench while acting as an informant for the FBI. The Court in that case recognized the possibility that a judge under those circumstances would be biased in favor of the prosecution, since the same prosecutor's office would later be called upon to decide whether she was deserving of leniency. While the case was not decided on due process grounds, the Pennsylvania Supreme Court stated that this Court's decision in Vasquez v. Hillary, supra, was "germane and informative". 617 A.2d 714, n.6.

majority held that even though Judge Maloney was not entitled to the usual presumption of integrity, Petitioner was nevertheless required to demonstrate actual bias on the part of Judge Maloney in this particular case. Thus, in holding that the Petitioner was not entitled to discovery in an effort to demonstrate that Maloney exhibited a pattern of general bias in favor of the prosecution in those cases in which he was not bribed, the majority stated:

Even if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in those cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in this case. This may be a case in which any judge would have ruled in favor of the government in the instances in which the defendants complain.

Bracy v. Gramley, supra at 691.

This Court should grant the writ in this case because the decisions of the Seventh Circuit are now completely out of line with this Court's prior cases on judicial bias in that they require a showing of actual bias in a particular case, which in most situations will be impossible to make. This means, in effect, that there can never be a reversal based upon judicial bias, no matter how egregious the misconduct, and this can only serve to greatly undermine the public's confidence in the judiciary. As the dissent in the Seventh Circuit correctly pointed out, Judge Maloney was himself an organized crime figure who converted his very office into a racketeering enterprise. 81 F.3d 699-701. This view of the situation is nothing more than a common sense appraisal, apparent at least to the average person, that there existed a "possible

temptation" on the part of Judge Maloney to be corrupt in all cases in which he was called upon to preside.

An additional ground for granting the writ is that there is a conflict between the Seventh and other Circuits as to the proper standard to be applied in determining when the Due Process clause requires that a judge be disqualified. Contrary to the holdings of the Seventh Circuit, the Tenth Circuit in Ferro v. Kirby, 39 F.3d 1462, 1478 (10th Cir. 1994) held that in certain circumstances, "likelihood of bias or appearance of bias" can be so substantial as to "create a conclusive presumption of prejudice". Similarly, the Ninth Circuit in Paradis v. Arave, 20 F.3d 950, 958 (9th Cir. 1994) reviewed a judicial disqualification issue under the appearance of bias standard.

The Seventh Circuit majority's reliance on Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) as an alternative basis of its decision is misplaced.⁶ Teague held that new rules of law are inapplicable to cases pending on collateral review. A rule is new if not dictated by existing precedent at the time that the defendant's conviction became final. The Seventh Circuit majority was incorrect in determining that the right to a fair and impartial judge constitutes a new rule. Both the common law and this Court's decision in Tumey v. Ohio, *supra*, required the

⁶ Teague in this case does not constitute a jurisdictional bar because the State never raised the issue as a defense, nor argued it on appeal. See, Collins v. Youngblood, 497 U.S. 37, 41, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

disqualification of a judge with the "slightest pecuniary interest".⁷ As the Seventh Circuit dissent correctly observed:

But surely common sense counts for something in the Teague analysis. The Greyford prosecutions had not yet taken place in 1981 when Bracy and Collins were tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison, not on the bench. There is, in short, nothing surprising in the petitioners' claim.

81 F.3d 704.

Petitioner maintains that under well established precedent, there was a sufficient showing to require reversal of the conviction. Alternatively, the District Court should have allowed discovery pursuant to Federal Habeas Rule 6(a) so as to afford the Petitioner the opportunity to demonstrate that the corrupt activities of Judge Maloney were so pervasive as to have had an appreciable affect on those cases in which he did not receive bribes.⁸ The Petitioner was faulted by the Seventh Circuit majority for not making a sufficient showing of prejudice, and at the same time was denied access to the basic procedural tools that he needed to be able to demonstrate the validity of his claim.⁹

⁷ Indeed, the Seventh Circuit majority was the author of a new rule in holding that Petitioner was required to make a showing of actual bias in this particular case.

⁸ It is the duty of the District Court to provide the necessary discovery, "... where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and therefor entitled to relief. . . . Harris v. Nelson, 394 U.S. 286, 300, 22 L. Ed. 2d 281, 89 S. Ct. 1623 (1969).

⁹ As was aptly pointed out by the Seventh Circuit dissent: "We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them of

B. The Rule Announced in this Case, That a Habeas Corpus Petitioner's Right to an Evidentiary Hearing Is Subject to a Higher Standard When His Claim Is Based upon Evidence Obtained Many Years After His Conviction, Is Contrary to This Court's Decision in Townsend v. Sain as well as Decisions of the Courts of Appeals and Creates an Unreasonable Risk That Serious Constitutional Violations Will Go Unredressed.

The key witness for the prosecution in securing Petitioner's 1981 conviction for murder was Morris Nellum, as the Illinois Supreme Court recognized in its opinion affirming this conviction on direct appeal. People v. Collins, 106 Ill. 2d 237, 488 N.E.2d 267, 277 (1985). In his federal habeas corpus petition, Petitioner alleged that he was denied due process of law by the State's knowing use of Nellum's perjured testimony at his trial. As support for this claim, Petitioner proffered Nellum's June, 1992 recorded statement to a defense investigator; Nellum's sworn statement to petitioner's counsel in July of 1992; and a transcript of the aborted deposition of Nellum in Arizona in April of 1993. These documents contained statements by Nellum that he lied at Petitioner's trial when he testified that he saw the victims being led to the car in the parking lot; he lied when he testified he heard gunshots and saw Murray Hooper at Roosevelt and Clark; he lied when he testified that he saw Petitioner in possession of a shotgun; and he lied when he denied that he had been beaten and threatened by the police. Nellum also stated that he was induced to testify falsely by one of the prosecutors at Petitioner's trial.

Despite these submissions, the District Court dismissed the petition without granting an evidentiary hearing on this claim, and the chance to render the theory anything more". 81 F.3d 699.

also denied Petitioner's alternative request for leave to depose Nellum. On appeal, the Court of Appeals framed the question before it as being what sort of showing a habeas petitioner must make to be entitled to an evidentiary hearing where his claim is based on evidence obtained "long after" his state conviction became final. 81 F.3d 692. Although agreeing with the District Court that the delay in obtaining the evidence of Nellum's perjury was not due to any lack of diligence on Petitioner's part, the Court of Appeals concluded that the fact of this delay required that Petitioner make a greater showing in support of his claim before he is entitled to a hearing. Id. at 692, 693. The court then applied this standard to affirm the District Court's denial of a hearing:

We cannot of course determine the credibility of Nellum's recantation; we can only express our suspicions. These are germane, however, because an evidentiary hearing need not be granted on the basis of newly discovered evidence presented many years after the defendant's conviction became final unless there is a good reason to expect the hearing to result in an order for a new trial.

Id. at 694.

While acknowledging that the above proposition is not "clearly articulated in any case", the Court of Appeals concluded that it was "consistent with the results in the cases and sound as a matter of first principles". Id.

Review by this Court is warranted, as the new condition on a petitioner's right to an evidentiary hearing adopted in this case is in fact inconsistent with this Court's decision in Townsend v. Sain, 372 U.S. 293, 96 Ed. 2d. 770, 83 S. Ct. 745 (1963) and finds no support in the case law from the courts of appeals applying

Townsend. Moreover, the policy considerations relied upon by the court below do not support this restriction on a petitioner's ability to seek federal relief from a state conviction, and in this case sentence of death, which might well have been tainted by grave constitutional error.

In Townsend v. Sain, this Court held that when a petitioner alleges facts which, if true, would entitle him to relief, and these facts are in dispute, "the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . ." 372 U.S. at 312. In so holding, the Court did not suggest that a different, more stringent standard might apply where a claim was based on facts not discovered until long after the state court proceeding. Indeed, later in its opinion, the Court specifically addressed the case of claims based on newly discovered evidence "which could not reasonably have been presented to the state trier of facts," and held that unless the allegation was frivolous or incredible the federal court must grant an evidentiary hearing. 372 U.S. at 317. Once again this Court never intimated that a different standard would apply depending on how long after the state proceeding the new evidence was obtained.

While acknowledging the first of the above-quoted passages from Townsend, the Court of Appeals concluded that it could not be taken literally based this Court's later statement in Blackledge v. Allison, 431 U.S. 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977), that the district court "may employ a variety of measures in an

effort to avoid the need for an evidentiary hearing." 81 F.3d 693. However, when viewed in context, this statement does not undermine Townsend's standard for when a habeas petitioner is entitled to federal court factfinding on his constitutional claim. In Blackledge, this Court remanded the cause to the district court with directions that the petitioner be afforded a "full opportunity for presentation of the relevant facts" bearing upon his claim. 431 U.S. at 82-83. In so doing the Court made clear that an evidentiary hearing would be required unless alternative procedures such as discovery or expansion of the record under Habeas Rules 6 and 7 proved adequate to fully and fairly adjudicate petitioner's claim. The Court of Appeals' reliance on Blackledge is particularly inappropriate here. In this case, petitioner sought discovery as an alternative to his request for an evidentiary hearing but was denied that as well.

While asserting that the new standard it announced in this case "seems to us consistent with the results in the cases," the court below fails to cite a single example. To the contrary, in applying this court's decision in Townsend, the courts of appeals have ordered evidentiary hearings regardless of the passage of time. See, e.g., Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991) (evidentiary hearing ordered on Brady claim based on evidence discovered 15 years after trial); Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993) (evidentiary hearing ordered on claims of prosecutorial falsification and suppression of evidence based on evidence discovered 10-11 years after trial); Porter v. Singletary, 49 F.3d

1483 (11th Cir. 1995) (evidentiary hearing ordered on claim of judicial bias based on affidavits written 17 years after trial); see also East v. Scott, 55 F.3d 996 (5th Cir. 1995) (discovery ordered on claim of participation of private prosecutor based on mere allegations 13 years after trial).

The policy considerations offered by the Court of Appeals also do not support its new standard for the right to an evidentiary hearing. The court offers two major justifications for its departure from Townsend. First, the court writes that "[t]o reopen a criminal proceeding many years after the defendant was convicted and his conviction affirmed . . . is an extraordinary interference with the finality of the criminal process . . ." 81 F.3d 692-693. The court then asserts that "[t]his consideration makes judges hesitate to order new trials on the basis of newly discovered evidence unlikely to be reliable or, even if believed, to undermine confidence in the verdict." Id. at 693. These observations ignore the fact that the petitioner does not contend that his submissions entitle him to a new trial. He argues only that his submissions are sufficient to entitle him to an opportunity to investigate his claim and to have the validity of this claim determined at an evidentiary hearing. To allow discovery and a hearing on the facts of this case would not necessarily imperil finality concerns. If upon remand the District Court determined after a full airing of the issue that Nellum's recantation is not reliable, then relief would be denied. A new trial would be ordered only if the recantation is found to be genuine, as required by due process of law.

Second, the Court of Appeals relied on its conclusion that, because of the passage of time, the testimony at an evidentiary hearing itself might be unreliable and further noted that the State was not responsible for failure to hold an evidentiary hearing at an earlier time. Id. at 693. The first of these concerns does not warrant imposing a higher standard for evidentiary hearings as district courts are entirely capable of factoring in the passage of time in making credibility determinations. As to the other point, the Court of Appeals overlooks the fact that if Petitioner's claim that the State knowingly used Nellum's perjured testimony is true, the delay in uncovering this fact is indeed the fault of the State.

The Seventh Circuit majority was also incorrect in suggesting that the recantation was insufficient to justify an evidentiary hearing because Nellum only recanted a portion of his original testimony. 81 F.3d 694. The key factor overlooked by the Court is Petitioner's proffered evidence indicating subornation of perjury on the part of the State. False testimony which goes to the credibility of a key witness is sufficient to warrant a new trial even if it does not bear directly on guilt or innocence. Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959). The question is whether, in light of the proffered impeachment, a reviewing court can be confident that the jury's verdict would have been the same. Kyles v. Whitley, ___ U.S. ___, 131 L. Ed. 2d 302, 115 S. Ct. 1555, 1575 (1995). Subornation of perjury on the part of the State casts in doubt the integrity of the entire evidence gathering process. If the government is willing to go so far as to

induce a witness to lie, there is reason to believe that it would be dishonest about other aspects of the investigation.

In conclusion, Petitioner has alleged facts supported by sworn statements of the State's key witness, which, if true, establish that his conviction and sentence of death were knowingly obtained by the State through the use of perjured testimony. This Court should grant certiorari to review the Court of Appeals' application of an unprecedented and unreasonably stringent standard which has deprived Petitioner of any opportunity to establish the truth of this claim.

VI.

CONCLUSION

The Petitioner requests that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,


Counsel of Record

Gilbert H. Levy
200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
206 443-0670

commentary, which requires consideration of any prior conviction receiving any points under the criminal history guideline, even if that conviction was not separately considered under section 4A1.1(a). Krzeminski's conviction for felonious assault was properly assessed a point under section 4A1.1(f), and the commentary to section 2K2.1 therefore requires that it be counted in setting Krzeminski's base offense level. See U.S.S.G. § 2K2.1 comment. (n.5). Because Krzeminski does not suggest that Application Note 6 "violates the Constitution or any federal statute, or that the note is inconsistent with, or a plainly erroneous reading of," section 2K2.1, that note is authoritative and binds us here. See *Stinson v. United States*, 608 U.S. 36, 37-39, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

Krzeminski's sentence is AFFIRMED.



William BRACY, Petitioner-Appellant,
v.
Richard B. GRAMLEY, Respondent-Appellee.
Roger COLLINS, Petitioner-Appellant,
v.
George C. WELBORN, Respondent-Appellee.
Nos. 94-3801, 94-3807.
United States Court of Appeals,
Seventh Circuit.
Argued Nov. 29, 1996.
Decided April 12, 1996.
Rehearing and Suggestion
for Rehearing En Banc
Denied June 26, 1996.*

Habeas Petitioners' armed robbery, aggravated kidnapping, and murder convictions were affirmed, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, by the Illinois Supreme Court. The trial court's denial of postconvic-

* Judges Ripple, Rovner, and Diane P. Wood voted

tion relief was also affirmed, 153 Ill.2d 130, 180 Ill.Dec. 60, 606 N.E.2d 1137. Petitioners sought federal habeas corpus relief. The United States District Court for the Northern District of Illinois, William T. Hart, J., denied petitions. Petitioners appealed. The Court of Appeals, Posner, Chief Judge, held, in an apparent case of first impression, that (1) petitioners were not entitled to new trial despite fact that state trial judge who presided over their capital murder prosecution was later convicted of having accepted bribes from criminal defendants in several other cases; (2) petitioners were not entitled to additional discovery to further examine possibility that trial judge was biased; (3) prosecutor did not commit prejudicial misconduct; and (4) prosecution witnesses' recantation of part of his testimony did not warrant new trial.

Affirmed.

Ilana Diamond Rovner, Circuit Judge, dissented and filed opinion.

1. Habeas Corpus §-450.1, 452
With few exceptions, person convicted in state court may not obtain order for new trial from federal habeas court on basis of constitutional errors committed at trial unless errors resulted in actual prejudice, or, equivalently, unless they substantially influenced verdict. 28 U.S.C.A. § 2254.
2. Habeas Corpus §-712.1
Confession of alleged accomplice who was tried separately from habeas petitioners could not be used to show that state trial court errors of which petitioners complained were unlikely to have affected guilty verdict, since confession implicated petitioners in murders and was thus inadmissible at their trial.
3. Habeas Corpus §-467
Judicial bias is structural defect in constitution of trial mechanism, as distinct from mere trial error, that automatically entitles petitioner for habeas corpus to new trial. 28 U.S.C.A. § 2254.

to grant the petition for rehearing en banc.

4. Habeas Corpus §-467
For judicial bias to be automatic ground for reversal of state criminal conviction, habeas petitioner must show either actuality, rather than just appearance, of judicial bias, or possible temptation so severe that habeas court might presume actual, substantial incentive to be biased. 28 U.S.C.A. § 2254.

5. Habeas Corpus §-467
Rule that judicial bias of state trial court judge automatically entitles petitioner for habeas corpus to new trial must be interpreted circumspectly, with due recognition of cost to society of overturning convictions of guilty in order to vindicate abstract interest in procedural fairness. 28 U.S.C.A. § 2254.
6. Habeas Corpus §-467
Fact that state trial judge who presided over habeas petitioners' capital murder prosecutions was later convicted of having accepted bribes from criminal defendants in several other cases did not automatically mean that there was judicial bias in petitioners' capital murder prosecutions warranting new trial. 28 U.S.C.A. § 2254.

7. Constitutional Law §-259
Appearance of judicial impropriety does not constitute denial of due process warranting new trial. U.S.C.A. Const.Amend. 14.
8. Habeas Corpus §-688
Discovery is available in habeas corpus proceeding not as matter of course as in ordinary civil litigation but only if district judge finds "good cause" to order discovery. Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C.A. foll. § 2254.

9. Habeas Corpus §-688
Habeas petitioners were not entitled to depose certain persons and witnesses who were most intimately associated with state trial judge who was convicted of having accepted bribes from criminal defendants in several other cases, in order to determine whether there was actual bias by judge in their case, where even if discovery showed that judge leaned over backwards in favor of prosecution in cases in which he was not biased, in order to conceal his taking of bribes in other cases, it would not show that

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he followed practice in petitioner's capital murder prosecutions. 28 U.S.C.A. § 2254.

10. Criminal Law §-641.13(2.1)

Defense counsel's failure to object to selection of juror who was wife of state judge who had once sentenced defendant to prison for armed robbery did not constitute ineffective assistance of counsel in defendants' capital murder prosecution; only possible deficient performance was defense counsel's statement to jury that juror's husband, although not identified as such, had once given defendant most severe sentence that he had ever received, and likely prejudice from this statement was too slight to warrant new trial, or evidentiary hearing. U.S.C.A. Const.Amend. 6.

11. Criminal Law §-726

Prosecutor's statement, in response to defense counsel's accusations that prosecutor made prosecution witness tell lie in order to obtain capital murder conviction, that he would not risk his professional career, his family, or his future by putting witness on stand and making him lie did not constitute improper "vouching" for truth of witness's testimony but, rather, prosecutor was merely denying that prosecutor had made witness lie.

See publication Words and Phrases for other judicial constructions and definitions.

12. Habeas Corpus §-603

To reopen state criminal proceeding many years after habeas petitioner was convicted and his conviction affirmed is extraordinary interference with finality of the criminal process and requires demonstration that hearing would probably yield evidence that would require new trial at which petitioner would have substantial chance of acquittal. 28 U.S.C.A. § 2254.

13. Habeas Corpus §-742

District court may employ variety of measures in effort to avoid need for evidentiary hearing on disputed facts, including discovery to expand record to include evidentiary materials that may resolve factual dispute without hearing. Rules Governing § 2254 Cases, Rule 7, 28 U.S.C.A. foll. § 2254.

14. Habeas Corpus §742

When request for federal evidentiary hearing is based on evidence gathered long after event, too late to be presented to state courts, which cannot be faulted for having failed to provide habeas petitioner with evidentiary hearing, federal court is entitled to insist, as precondition to granting hearing, that petitioner demonstrate that he have "colorable claim," meaning by this not that it be nonfrivolous on its face but that there be some reason to think it valid. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

15. Habeas Corpus §497

Knowing use of perjured testimony by prosecution, although very serious infringement of constitutional rights of criminal defendant, is not automatic basis for new trial; there must be reasonable likelihood that violation affected verdict. U.S.C.A. Const. Amend. 6.

16. Habeas Corpus §491, 497

Even if prosecution witness' recantation of part of his testimony, approximately 14 years after defendants' capital murder convictions, was believed over that of prosecutors and police, thus establishing that prosecution made knowing use of perjured testimony that incriminated third murderer, new trial would not be warranted, where witness' recantation occurred many years after capital murder trial, where evidence of defendants' guilt was very powerful, and where core of witness' testimony, including testimony that defendants committed murders, was not recanted.

17. Criminal Law §977(3)

Defense counsel were not entitled to continuance immediately after jury convicted defendants of capital murder to obtain evidence of mitigating circumstances for submission at death penalty hearing, as counsel were aware that, in Illinois, sentencing hearing perforce follows immediately upon trial.

18. Criminal Law §208.1(6)

Under Illinois law, existence of aggravating circumstance need only be proved by

preponderance of evidence, provided that at least one such circumstance has been proved beyond reasonable doubt, thus making defendant eligible for death sentence. S.H.A. 720 ILCS 5/9-1(f).

19. Criminal Law §641.13(7)

Defense counsel's failure to present alibi evidence during death penalty sentencing hearing that might have persuaded jury that defendant had not committed out-of-state murders for which defendant was charged but not convicted did not constitute ineffective assistance of counsel, where defendant was later convicted and sentenced to death for out-of-state murders. U.S.C.A. Const. Amend. 6.

20. Criminal Law §726

Prosecutor's remark in closing argument during sentencing phase of defendant's capital murder prosecution that killing during war was not violation of Fifth Commandment of Bible was not fatally prejudicial, where remark was merely response to defense counsel's argument that to sentence defendants to death would violate Ten Commandments, and where prosecutor was pointing out that there was such a thing as justified homicide and that execution of duly convicted and sentenced murderer was, plausibly, illustration of it.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 93 C 532K, 93 C 5382—William T. Hart, Judge.

Martin Carlson, Chicago, IL, Gilbert H. Levy (argued), Seattle, WA, for Bracy.

Rita M. Novak, Office of the Atty. Gen., Kevin Sweeney (argued), Office of the State's Atty. of Cook County, Criminal Appeals Div., Chicago, IL, for Gramley.

Stephen E. Eberhardt (argued), Marshall J. Hartman, Chicago, IL, Robert H. Farley, Jr., Naperville, IL, for Collins.

James F. Ryan, Office of the Atty. Gen., Steven J. Zick, Office of the Atty. Gen., Criminal Appeals Div., Chicago, IL, Kevin Sweeney (argued), Office of the State's Atty.

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of Cook County, Criminal Appeals Div., Chicago, IL, for Wellborn.

Before POSNER, Chief Judge, and CUMMINGS and ROYNER, Circuit Judges.

POSNER, Chief Judge.

William Bracy and Roger Collins were convicted in an Illinois state court in 1981 of three murders committed the previous year. They were sentenced to death and after exhausting their state remedies (see *People v. Collins*, 106 Ill.2d 257, 87 Ill.Dec. 910, 478 N.E.2d 257 (1985); 153 Ill.2d 130, 180 Ill.Dec. 6, 606 N.E.2d 1137 (1992)) sought habeas corpus in federal district court. Judge Hart denied them relief, *United States ex rel. Collins v. Wellborn*, 868 F.Supp. 960 (N.D.Ill. 1994), and they have appealed, arguing that the state denied them due process of law both at their trial and in the sentencing hearing.

The victims had been taken, bound, from an apartment in a building on the south side of Chicago and had been driven to a viaduct and there shot to death with pistols and a shotgun. The main prosecution witness was Morris Nellum, an accomplice who testified for the government in exchange for being charged only with concealing a felony and promised that the state would recommend a sentence of only three years. (In fact he received only two and a half years—and of probation, not prison.) Nellum testified that Collins had summoned him to the apartment, where he had watched as the victims were led out of the apartment and into a waiting automobile by Bracy, Collins, and a third man, Hooper. (Hooper was tried separately, convicted, and sentenced to death. See *People v. Hooper*, 133 Ill.2d 469, 142 Ill.Dec. 93, 632 N.E.2d 684 (1989), affirming the conviction but vacating the death sentence. On remand, Hooper was again sentenced to death, and this time the Supreme Court of Illinois affirmed. 1996 WL 30647 (Ill. Jan. 8, 1996).)

Collins told Nellum to drive Collins's car, which was parked near the apartment building to the viaduct. Collins and Hooper then got into the car that contained the three victims and drove away, followed by Bracy in

implicated them and the confession is further evidence, though of course not evidence presented to the jury in our case, that they really did, along with Hooper, commit the murders. Because this evidence was inadmissible it cannot be used to show that the errors of which Bracy and Collins complain are unlikely to have affected the verdict. Cf. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *United States v. Ross*, 77 F.3d 1625 (7th Cir. 1996). But the evidence that was admissible shows that they were guilty and this is important because, with a few exceptions, a person convicted in a state court may not obtain an order for a new trial from a federal court on the basis of constitutional errors committed at the trial unless the errors resulted in actual prejudices, or, equivalently, unless they substantially influenced the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993), or, in other words, were likely to have made the difference between conviction and acquittal.

The only error that the petitioners argue requires a new trial regardless of whether it was prejudicial is that the judge who presided at their trial was later convicted of having accepted bribes from criminal defendants in several other cases (including murder cases) around the time when Bracy and Collins were tried. *United States v. Maloney*, 71 F.3d 645, 650-52 (7th Cir. 1996). There is no suggestion that Bracy and Collins bribed or offered to bribe him. The argument rather is that Judge Maloney came down hard on criminal defendants in cases in which he was not bribed, to avoid suspicion that he was on the take, to cancel any bad impression that his acquittals might make on the voters—maybe even to make defendants desperate to bribe him, fearing he would punish them with adverse rulings if they did not. There is no evidence, but only conjecture, that Maloney actually did lean over backwards in favor of the prosecution in this or any other case in which he was not bribed; did, that is, rule against the defense only because he was taking bribes in other cases. Collins argues that evidence is unnecessary, and Bracy that if it is necessary their request for discovery should have been granted.

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presented for decision in it. The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway.

[5] Sometimes—this is the second half of the test that we quoted from *Del Vecchio*—the incentive to engage in biased behavior is so great that inquiry into the actuality of that behavior is precluded. *Id.* at 1372-73; see also *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). This rule recognizes both the practical impediments to obtaining reliable evidence of a judge's motives and the difficulty of overcoming public skepticism of judicial motives when the temptation to impropriety is great. But the automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness. The fact that the people for obvious practical reasons do not have judicially enforceable rights to the protection of the criminal laws (though they do have judicially enforceable rights against discriminatory withdrawal of that protection) does not warrant a court in disregarding their interests when the court is formulating rules of constitutional law. Accepting Collins's contention would require a new trial in every case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor. (If the defendant had bribed the judge and been acquitted, the double jeopardy clause probably would not bar reprosecution. *Renard v. State*, 61 S.W.2d 427, 430 (Tex.Crim.App.1972)—a defendant would never have been in any actual "jeopardy." The issue has not been definitively resolved, however, David S. Rudstein, "Double Jeopardy and the Fraudulent—Obtained Acquittal," 60 Mo. L. Rev. 607 (1986), and obviously need not be in order to decide the present case.) Any judge who is on the take will have an incentive to adopt Judge Maloney's alleged strategy and thus always do his best (or worst) to see to it that a defendant who does not bribe him is convicted. A principled acceptance of Collins's

argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes. The fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence.

The assumption underlying Collins's argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that any system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime. See generally Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 U.Chi.L.Rev. 689, 725-29 (1996).

No precedent has been cited to us for invalidating a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in other cases. *Trague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), disapproved the use of novel grounds to grant relief on an application for habeas corpus. The state does not cite *Trague*, but we are free to apply it anyway. *Caspari v. Bohlen*, — U.S. —, —, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994); *Eglin v. Wellborn*, 57 F.3d 496, 499 (7th Cir.1996) (en banc). The argument for automatic reversal is not compelling even if its lack of a secure grounding in prior cases and its alarming potential irradiation of future cases are ignored. While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is equally possible that he would fear that by doing so he would create a

it crosses the line from advocacy to testimony. Defense counsel had accused the prosecutor of wanting to convict Collins so badly that he "made a guy [Hoffman] come in here and tell you something that he knows is not in that report." In other words, defense counsel was accusing the prosecutor of having made a witness tell a lie. The prosecutor denied this in the passage that we have quoted. This was not vouching for the truth of the witness's testimony. It was denying that the prosecutor had made the witness lie. And anyway vouching is not a violation of any specific constitutional right but at most an irregularity that if shown in a particular case to have been likely to have led to the conviction of an innocent man might be held to be a denial of due process of law in that case. *Rodriguez v. Peters*, 63 F.2d 546, 558 (7th Cir.1936); *Kappas v. Hawks*, 54 F.2d 365, 367 (7th Cir.1946). No such inference is possible here.

The next question is the standard for granting an evidentiary hearing when, long after the conviction of a criminal defendant, a prosecution witness steps forward and recants a part of his testimony. Many years after the trial of Bracy and Collins, a private investigator retained by the defendants' counsel talked to Morris Nellum. Later Nellum was interviewed by Bracy's lawyer and a transcript was made of that interview. Nellum did not recant his testimony that Bracy and Collins had committed the murders. He merely tried to exonerate the third murderer, Hooper. But in explaining how he had come to testify against Hooper he made lurid accusations that the police had beaten Bracy and him (Nellum) and threatened him with a sledgehammer and that the prosecutors had told him to lie about such details as when he had first told the police where the pistols used in the murders had been pitched. The jury had been told that Nellum had at first denied knowing the whereabouts of the gun but that the prosecutors had told him to lie about that denial.

Nellum later repeated a part of his recantation in a deposition that was interrupted when an Illinois prosecutor who had talked to him after the interview with defense counsel, and an Arizona prosecutor, reminded

Nellum that he had said he only wanted to testify in front of a judge. In seeking an evidentiary hearing the defendants' lawyers rely primarily on the transcript of the interview rather than on the interrupted deposition. They argue that it creates enough suspicion that the prosecutors knowingly used perjured testimony at the trial to require an evidentiary hearing to get to the bottom of Nellum's recantation.

None of the alleged lies concerns a matter vital to the government's case. Nellum did not deny that he was present when the victims were removed from the apartment, that he drove to the viaduct to pick up Collins, and that he saw Collins toss the pistols into Lake Michigan. Yet if the jury had thought that the police had beaten Nellum and that the prosecutors had coerced him to lie, albeit about details of the offense rather than about the involvement of the defendants, his credibility, already compromised because he was testifying in exchange for the promise of a sentence extraordinarily lenient considering that he had been an accomplice in three murders, might have been so far impaired that the jury would have disbelieved the core as well as the periphery of his testimony.

[12] Given this possibility, we must consider what showing based on newly discovered evidence that a constitutional violation may have been committed at trial (here, the knowing use of perjured evidence by the prosecution) is necessary before a hearing to determine the truthfulness of the evidence is required. The state argues only weakly that the petitioners should have obtained the recantation sooner, in which event it would not be newly discovered evidence in the relevant sense. *Denver v. Kansas State Penitentiaries*, 36 F.2d 1531, 1536 (10th Cir.1944). So the request for an evidentiary hearing is not barred by a want of diligence, and furthermore it cannot be a condition of the grant of such a hearing that the movant already have in his possession all the evidence that he seeks to develop in the hearing. But equally it cannot be enough that the petitioner has found some new evidence. To reopen a criminal proceeding many years after the defendant was convicted and his conviction affirmed (which in this case occurred more

than ten years ago) is an extraordinary interference with the finality of the criminal process and requires a demonstration that a hearing would probably yield evidence that would require a new trial at which the petitioner would have a substantial chance of acquittal. In view of the passage of time since, and the disordered social milieu in which, the petitioners committed these murders, it is doubtful whether they could be retried with good prospects for an accurate verdict, even though their guilt of multiple murders committed in cold blood is not in doubt. They cannot be blamed for the fact that it has taken fifteen years for their challenge to their convictions to come to this court; so far as we can tell, they have not abused the postconviction process. But one consequence of the extraordinary delays that are tolerated in capital cases in order to minimize the risk of mistaken execution is that an order for a new trial issued toward the end of the normal postconviction process may have the practical effect of an acquittal. This consideration makes judges hesitate to order new trials on the basis of newly discovered evidence unlikely to be reliable or, even if believed, to undermine confidence in the verdict.

[13] We are mindful that in *Toussand v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 766, 9 L.Ed.2d 770 (1963), the Supreme Court stated that "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing" unless the petitioner received a full and fair hearing in state court. This passage from the *Toussand* opinion continues to be quoted approvingly. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993). But it cannot be taken literally, since we know that the district court "may employ a variety of measures in an effort to avoid the need for an evidentiary hearing" on disputed facts. *Blackledge v. Allison*, 431 U.S. 63, 81, 97 S.Ct. 1621, 1633, 52 L.Ed.2d 136 (1977), including a direction to expand the record to include evidentiary materials that may resolve the factual dispute without a hearing. *Id.* at 82, 97 S.Ct. at 1633; Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts.

very serious infringement of the constitutional rights of a criminal defendant, is not an automatic basis for a new trial. There must be a reasonable likelihood that the violation affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2582, 2597, 49 L.Ed.2d 342 (1976); *Giglio v. United States*, 400 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Boyd*, 56 F.2d 239, 243 (7th Cir.1936). The evidence of Bracy's and Collins' guilt was very powerful and evidence brought out at the evidentiary hearing which if repeated at a new trial would merely cast doubt on Nellum's credibility would be unlikely to sway a jury. We are imagining a new trial at which all the evidence is the same except that Nellum changes some of the details of his earlier testimony, and, when the charges are thrown in his face, makes lurid accusations against the police and the prosecutors. The core of Nellum's testimony would be unaffected and would be richly corroborated by the testimony of the other witnesses whose evidence we summarized at the beginning of this opinion (assuming those witnesses can be found and persuaded to testify or the transcript of their original testimony is admitted at the second trial), and by the guns. Of course we cannot be certain that once Nellum started down the recantation path he would go no further than he has done to date. Having completed his bargained-for sentence long ago he has no incentive to cooperate with the prosecution. But the more sweeping his recantation, the less credible it is likely to be.

Prosecutors frequently rely heavily on the testimony of members of the criminal class, such as Nellum, who did not "go straight" after completion of his light sentence for his role in the murders. They have no choice. These witnesses from the criminal demimonde are not only unreliable witnesses, as the defendants' counsel emphasized to the jury in asking them to disbelieve Nellum's testimony; they are unreliable people. We would be imperiling the punishment of dangerous criminals if we established a precedent that would invite the lawyers for convicted defendants (especially in capital cases, not only because of the stakes involved but also because few prisoners other than those

determines whether he is to be sentenced to death, unless as in this case the defendant waives his right to be sentenced by the jury. Since it is the same jury, the sentencing hearing perforce follows immediately upon the trial, as it also does when the jury is waived. Defense lawyers know all this and therefore if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends. But in this case the defendants' lawyers dropped the ball and the defendants argue in the alternative that by doing so the lawyers failed to provide competent assistance of counsel at the sentencing hearing.

[18, 19] Perhaps so, but we need not decide this; for there was no prejudice, and without proof of prejudice a claim of ineffective assistance of counsel cannot succeed. The defendants' current lawyers have turned up no mitigating circumstances that might have been put before the jury with a fair chance of success. It is true that one of the aggravating circumstances, though limited to Bracy, is that shortly after participating in the triple murder in Chicago he participated in a double murder in Arizona. He had not yet been tried for those murders but the woman who was the wife and daughter of the murder victims and the state's main witness was brought to Chicago to testify in the sentencing hearing that Bracy was indeed one of the Arizona murderers. The defendants argue that their lawyers failed to present alibi evidence that might have persuaded the jury that Bracy had not committed those murders. We have little patience with this argument. Bracy was later convicted and sentenced to death for the Arizona murders, and the burden of proof that the state bore in convicting him was of course higher than it bore in the sentencing hearing, for the existence of an aggravating circumstance need only be proved by a preponderance of the evidence, provided that at least one such circumstance has been proved beyond a reasonable doubt, thus making the defendant eligible for the death sentence. 720 ILCS 5-1-1(f); *Free v. Peters*, 12 F.2d 700, 703 (7th Cir.1933); *People v. Ramsey*, 152 Ill.2d 41, 178 Ill.Dec. 19, 35-36, 604 N.E.2d 275, 291-92 (1992). So if all the evidence that had been

before the Arizona jury had been presented to the jury in Chicago, the Chicago jury surely would have found that Bracy had committed the Arizona murders. Not all that evidence was presented, so maybe the jury would have been swayed by alibi evidence that we now know is false. But no principle of justice authorizes throwing out a sentence on the ground that the sentence might have been different had the defendant been allowed to present false testimony. *Lockhart v. Fretwell*, 506 U.S. 364, 369-71, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175-76, 106 S.Ct. 988, 990-99, 89 L.Ed.2d 123 (1990).

[20] Bracy objects to some remarks by the prosecutor at the closing argument at the sentencing hearing. The worst was, "Some of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment of the Bible." This was a response to defense counsel's argument that to sentence the defendants to death would violate the Ten Commandments, one of which of course is, "Thou shalt not kill." The prosecutor was pointing out, with unnecessary but not we think fatally prejudicial emphasis, that there is such a thing as justified homicide and that the execution of a duly convicted and sentenced murderer is, plausibly, an illustration of it.

Collins objects to the exclusion of a prospective juror on the basis of his acknowledging in response to a question by the judge that he would "probably" not consider imposing the death penalty. The defendants' lawyer did not object to excusing this prospective juror for cause. We do not think this was error, and certainly not error of constitutional proportions, given the absence of an objection. *Wainwright v. Witt*, 469 U.S. 412, 424-26, 429, 105 S.Ct. 844, 852-54, 855 83 L.Ed.2d 841 (1985).

The petitioners present other issues, but they either have too little merit to warrant discussion or they are foreclosed by previous decisions of this court that we are not given any reason to reexamine. We have considered the possibility that the cumulative effect

of the various irregularities alleged tips the balance in favor of a new trial or a new sentencing hearing but have concluded that it does not. We regret that Judge Maloney presided over the petitioners' trial but we do not think that the Constitution relieves them from the judgments that the Illinois courts have rendered.

APPENDIX

ILANA DIAMOND ROVNER, Circuit Judge, dissenting.

No right is more fundamental to the notion of a fair trial than the right to an impartial judge. *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423 (1971) (per curiam); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 90 L.Ed. 942 (1955); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Village of Monteville*, Ohio, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Turney v. Ohio*, 273 U.S. 610, 47 S.Ct. 437, 71 L.Ed. 749 (1927). "The truth pronounced by Justinian more than a thousand years ago, that 'Impartiality is the life of justice,' is just as valid today as it was then." *United States v. Brown*, 539 F.2d 467, 469 (6th Cir.1976) (per curiam). The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full parity of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

The State of Illinois placed the fate of William Bracy and Roger Collins in the hands of a racketeer. Thomas Maloney is presently serving a prison term of nearly sixteen years for racketeering, conspiracy to commit racketeering, extortion under color of official right, and obstruction of justice. A jury determined that Maloney had accepted \$10,000 in 1986 to acquit two El Rukn leaders of a double murder, an undetermined portion of a \$100,000 payment in 1981 to acquit three New York gang members of murdering a rival in Chicago's Chinatown, and between \$4,000 and \$5,000 in 1982 to convict another individual of voluntary manslaughter rather than felony murder. These

backwards in favor of the prosecution in cases in which he was not bribed; without proof that he followed that practice in this case, they reason, Bracy and Collins have no claim. Ante at 691. But when the trial judge is tainted by a pervasive conflict of interest—in other words, one not limited to a particular litigant or type of case—evidence given case is unnecessary. Here the showing that my colleagues require would be all but impossible to make, absent either an extraordinary admission from Maloney, which is not forthcoming (Maloney continues to proclaim his innocence) or the kind of over-the-top courtroom behavior that makes a judge's partiality plain (see, e.g., *United States v. Dellinger*, 472 F.2d 340, 396-98 (7th Cir.1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973)), a rare phenomenon not evident from the record here. In any event, the Supreme Court has expressly rejected the idea that such proof is mandated, finding that it "requires too much and protects too little." *Ward*, 409 U.S. at 61, 93 S.Ct. at 83; see also *Aetna*, 475 U.S. at 830-31, 106 S.Ct. at 1590 (Brennan, J., concurring); id. at 831-33, 106 S.Ct. at 1590-91 (Blackmun, J., concurring). To establish a deprivation of due process, the petitioners need only show that the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Turney*, 273 U.S. at 632, 47 S.Ct. at 444; accord *Aetna*, 475 U.S. at 822, 106 S.Ct. at 1585; *Ward*, 409 U.S. at 60, 93 S.Ct. at 83; *Del Vecchio*, 31 F.3d at 1372, 1373. Proof that Maloney was motivated by virtue of his bribe taking to favor the prosecution and disfavor the defense in unfixed cases would permit, if not compel, the inference that Maloney's adverse rulings against Bracy and Collins were animated by a pernicious intent on Maloney's part (see Fed. R.Evid. 404(b)) and would more than satisfy the standard the Supreme Court has enunciated.

Habeas Rule 6(a) requires only that the petitioner demonstrate "good cause" to en-

were but three of the bribes that witnesses attributed to Maloney at his trial. See *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995); Matt O'Connor, *Judge Maloney found guilty in corruption case*, CHICAGO TRIBUNE, April 17, 1993, News, at 1. At sentencing, Judge Lettenweber also found that Maloney had, while still a practicing lawyer, cooperated in procuring the notorious acquittal of reputed mob hitman Harry Aleman by Judge Frank Rertucci in 1977. Mob enforcer Michael Rertucci testified that Maloney had helped him to evade a series of criminal charges by bribing judges as far back as the late 1960s, although Judge Lettenweber discounted this testimony. It would seem, in any event, that by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption, an art that he would practice at least until 1986, when he correctly perceived that he was under the watchful eye of the FBI and returned the \$10,000 bribe he had accepted in the El Rukn prosecution.

Bracy and Collins were tried before Maloney in 1981, in the midst of Maloney's bribe taking. Maloney did not solicit a bribe from either defendant, nor did the defendants offer him one. Nor did the prosecution bribe Maloney. But given the abundant proof (and a federal jury's finding) that justice was for sale in Maloney's courtroom, we are compelled to consider whether Maloney may be deemed the impartial judge to which due process entitled these defendants.

1.

The petitioners argue that in cases that were not fixed, Maloney had an incentive to be particularly tough on defendants, in order to divert suspicion that might otherwise be aroused by the acquittals he was paid to defendants to bribe him. Without conceding that further evidence of Maloney's partiality was required to establish Maloney's constitutional ineptness as a judge, the petitioners sought leave from the district court to engage in discovery, with the aim of establishing a pattern of corruption that affected Maloney's conduct in not only those cases in which he had accepted a bribe but also those

in which he had not. Judge Hart denied their request, deeming what the petitioners sought to prove to be a matter of speculation and, in any event, insufficient to establish a constitutional deprivation. *United States ex rel Collins v. Welborn*, 858 F.Supp. 950, 991 (N.D.Ill.1994). Like my colleagues in the majority, the district judge concluded that the most the circumstances permitted Bracy and Collins to argue was the mere possibility of bias, which *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363 (7th Cir.1994) (en banc), cert. denied, — U.S. —, 115 S.Ct. 1404, 131 L.Ed.2d 290 (1995), indicates is not enough to establish a deprivation of due process. 858 F.Supp. at 991.

In fact, the notion that Maloney was deliberately tough on defendants who did not bribe him finds support in the testimony presented at Maloney's trial. Defense attorney William Swano arranged several of the bribes for which Maloney was prosecuted and was a key government witness against him. In 1986, Swano represented James Davis, whom the state had charged with armed robbery. The case was assigned to Maloney for trial. By this time, Swano had already bribed Maloney on a number of occasions. But after investigating the prosecution's case against Davis, Swano concluded that it would be unnecessary to bribe Maloney in order to obtain an acquittal in this case: three witnesses to the robbery knew the two perpetrators and said that Davis was not one of them; Davis had an alibi; and the victim of the crime, who had initially identified Davis as one of the perpetrators, had confessed uncertainty about the identification. Swano was confident that "if the case was a not guilty in any courtroom in the building." *United States v. Thomas J. Maloney and Robert McGee*, No. 91 CR 477, 1994 WL 96673 Tr. 2528 (N.D.Ill. March 24, 1993). To Swano's surprise, however, Maloney convicted his client after a bench trial. Swano took this as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Tr. 2530. That Swano had correctly interpreted this conviction as a lesson was arguably confirmed by Maloney's haggard, Robert McGee. Swano met with McGee soon after Davis was convicted to discuss a fix in the double murder trial of the two El Rukns. Swano had

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persuaded his client that bribing Maloney was the prudent course, explaining that he had only lost one case before Maloney, "and that was the one case we didn't work." i.e., fix. Tr. 2544; see also Tr. 2559. In arranging the meeting with McGee, Swano had told him that he wanted to discuss "a hot case in front of Judge Maloney." Tr. 2546. McGee said that he would first have to obtain Maloney's permission. Tr. 2567. When Swano and McGee subsequently met at Le Bour-deux, a local watering hole, McGee told Swano that he had gotten the okay from Maloney to speak about the matter. Swano recalled: "He told me that the judge had said we could talk, especially in view of the way the judge had screwed me on the last case," which Swano understood to be a reference to the Davis case. Tr. 2567-68. Swano voiced agreement with the assessment "that the judge had screwed me on the case and had screwed my client." Tr. 2568. He and McGee then got down to details about the El Rukn fix. That bribe was one of four that the jury later found Maloney guilty of accepting.

One may infer from Swano's testimony that Maloney saw the Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that would ensure bribes in future cases. That, at least, was the moral of the story for Swano. If Swano was right (a matter for the factfinder, not us, to determine), then it would seem that Maloney's approach to case fixing was indeed the global view that Bracy and Collins posit: fixed cases were a source of illicit profit, whereas unfixed cases were an opportunity, as Bracy puts it, to "advertise" in the defense bar (Bracy Reply at 1) while at the same time protecting his franchise by currying favor with law and order minded voters and avoiding the ire of the law enforcement community. Like my colleagues, I think that the petitioners face an exceedingly difficult task in attempting to unearth evidence that will lend further support to their theory (see ante at 691), but Swano's testimony suggests that the search may not be futile.

At bottom, my colleagues believe that Bracy and Collins are not entitled to discovery because the most they can hope to prove is

that Maloney made it a practice to lean over backwards in favor of the prosecution in cases in which he was not bribed; without proof that he followed that practice in this case, they reason, Bracy and Collins have no claim. Ante at 691. But when the trial judge is tainted by a pervasive conflict of interest—in other words, one not limited to a particular litigant or type of case—evidence given case is unnecessary. Here the showing that my colleagues require would be all but impossible to make, absent either an extraordinary admission from Maloney, which is not forthcoming (Maloney continues to proclaim his innocence) or the kind of over-the-top courtroom behavior that makes a judge's partiality plain (see, e.g., *United States v. Dellinger*, 472 F.2d 340, 396-98 (7th Cir.1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973)), a rare phenomenon not evident from the record here. In any event, the Supreme Court has expressly rejected the idea that such proof is mandated, finding that it "requires too much and protects too little." *Ward*, 409 U.S. at 61, 93 S.Ct. at 83; see also *Aetna*, 475 U.S. at 830-31, 106 S.Ct. at 1590 (Brennan, J., concurring); id. at 831-33, 106 S.Ct. at 1590-91 (Blackmun, J., concurring). To establish a deprivation of due process, the petitioners need only show that the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Turney*, 273 U.S. at 632, 47 S.Ct. at 444; accord *Aetna*, 475 U.S. at 822, 106 S.Ct. at 1585; *Ward*, 409 U.S. at 60, 93 S.Ct. at 83; *Del Vecchio*, 31 F.3d at 1372, 1373. Proof that Maloney was motivated by virtue of his bribe taking to favor the prosecution and disfavor the defense in unfixed cases would permit, if not compel, the inference that Maloney's adverse rulings against Bracy and Collins were animated by a pernicious intent on Maloney's part (see Fed. R.Evid. 404(b)) and would more than satisfy the standard the Supreme Court has enunciated.

Habeas Rule 6(a) requires only that the petitioner demonstrate "good cause" to en-

gage in discovery, and Bracy and Collins have certainly done so here. In view of the jury's verdict against Maloney, it is undisputed that he was accepting bribes at the very time that Bracy and Collins came to trial. Although there is no suggestion that money oiled the wheels of justice in this case, my colleagues concede the plausibility of the notion that "a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes." Ante at 689. Putting aside for the moment contamination of the judge's philosophy, it seems to me likely that any judge who accepts bribes and wishes to remain on the bench will think in strategic terms about his other cases. As Chief Justice Posner points out, one might wonder whether it would really have been in Maloney's interest to assume a pro-prosecution mantle in unfixed cases, lest the occasional acquittal purchased from him look out of character. Ante at 689-90. But the time for such deliberation is after an evidentiary hearing on the matter, when the petitioners have had the opportunity to find and present whatever evidence there may be to establish any practice Maloney may have followed. Swano's testimony provides some evidence in that regard, and there may be more. Without giving Bracy and Collins the opportunity to present that evidence to Judge Hart, their claim of conflict can only be resolved on the basis of speculation, as my colleagues agree. Ante at 690. In view of the grave and structural nature of the petitioners' claim, not to mention the fact that this is a capital case, which "magnifies the appearance of impropriety," (ante at 689), the petitioners are entitled to more from us.

My colleagues note that Bracy and Collins have long had access to some of the information that they profess an interest in exploring—the records of other trials over which Maloney presided, and the record of Maloney's own trial, for example—but have not pointed to anything that bolsters their claim of partiality. Ante at 691. But if petitioners can be faulted for not making the most of the available material, we can be faulted for being naive about what the cold page of a trial record will reveal. A judge who wishes to be

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tough on the defendant need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. When he sold an acquittal, he wanted facts that he could hang his hat on (e.g., Maloney Tr. 2571, 2569-70, 2582); and we have no reason to doubt that if he wanted to cultivate a prosecution record to protect his interests as a bribe taker, he had the ability to do so discreetly, without appearing to have abused his discretion as a trial judge. Cases are fixed not in the courtroom but in bars, bath-rooms, and back hallways. If there is evidence of the kind Bracy and Collins hope to find, it is in the hands of persons familiar with these venues of injustice. Both Maloney and his haggard McGee are continuing their version of "standing tall" (see *United States v. Maloney*, 71 F.3d at 651-62), but Swano, Robert Cooley, and others may have something material to say, and the U.S. Attorney may be of some help in identifying whom the petitioners should approach. But it is likely that no one is going to talk without a subpoena, and petitioners should not be deprived of that instrument.

We are venturing into a realm noir with which, I may say with confidence, none of us is on intimate terms. We cannot simply assume that "the probability is slight" that discovery will yield Bracy and Collins anything. Ante at 691. Let them try. If their discovery proves fruitless, we can at least take comfort in the knowledge that we have given them every opportunity to prove that Maloney's corruption deprived them of a fair trial. We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them of the chance to render their theory anything more. I understand that Illinois has an interest in the finality of its judgments, and allowing the discovery that the petitioners seek would, if nothing else, portend a significant delay in the implementation of their death sentences. But having left Bracy and Collins to the mercies of a corrupt judge, the State should not be heard to complain in this matter. (In fact, its brief is utterly silent on this point.) The people of Illinois have as great an interest in the integrity of capital trials as Bracy and Collins do.

My disagreement with the majority goes deeper than the question of discovery, however. In the end, I agree with Collins and Bracy that proof of the impact Maloney's corruption had, or probably had, on the petitioner's trial is unnecessary. We do not know, and we likely will never know, what Maloney thought about Bracy and Collins. But we have a pretty clear picture of how he viewed justice. The price tag may have varied, but as Maloney's conviction proves, justice was for sale in Maloney's courtroom to the defendants who could afford to pay, even when they were charged with the most heinous of crimes. That fact carries far more significance than the majority is willing to recognize. As this court acknowledged in *Del Vecchio*, in considering whether a biasing influence requires the disqualification of a judge, "we begin . . . by presuming 'the honesty and integrity of those serving as adjudicators.'" 31 F.3d at 1375 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 96 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975)). That presumption, as my colleagues acknowledge, is "obviously inapplicable here." Ante at 688. Maloney was not Louis Garippo, an esteemed and honest judge whose impartiality was argued to have been potentially compromised by his prior involvement with the defendant as a prosecutor. See *Del Vecchio*, 31 F.3d at 1375-80 (majority); id. at 1389 (Cudahy, J., dissenting); id. (Ripple, J., dissenting). Nor was he even Otto Kerner, a judge whose crimes pre-dated his service on the bench. See *United States v. Loucas*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 and cert. denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974). Maloney was a criminal who, as a judge, transformed his very office into a racketeering enterprise.

Faced with the possibility of vacating numerous convictions obtained in Maloney's courtroom, we would like to believe that he was capable of the impartiality that the Fourteenth Amendment requires when no money changed hands. But how can we? Once he embarked on the path of bribe taking, Maloney had forsaken his judicial oath.

Justice was a mere commodity to him, defendants nothing more than a profit center. His deviation from the path of righteousness was not, moreover, momentary and uncharacteristic; it was cold, calculated, and spanned a period of years, if not the entirety of his tenure on the bench. Thus, Maloney's "bias," if we can call it that, cannot be conveniently compartmentalized. *Cf. Diversified Numerics, Inc. v. City of Orlando, Florida*, 949 F.2d 382, 385 (11th Cir.1991) (per curiam). We may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons a black robe, and hoodwinks everyone with a credible impersonation of Oliver Wendell Holmes. Maloney's willingness to exchange money for the freedom of those charged with the most abhorrent crimes displayed his scorn for the very concept of justice.

By demanding proof that Maloney's corruption either had or likely had an identifiable impact on the petitioners' trial, we fail to come to grips both with the gravity of Maloney's offense and with the constitutional imperative that the accused be tried before a judge of integrity and impartiality. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Acton*, 475 U.S. at 825, 106 S.Ct. at 1587 (quoting *Murkison*, 349 U.S. at 136, 75 S.Ct. at 625). We said in *Del Vecchio* that "had appearances alone [do not] require disqualification" (31 F.3d at 1372), but that an external influence requires the judge's disqualification when "the influence [involved strikes] at the heart of human motivation, that an average man would find it difficult, if not impossible, to set the influence aside" (*id.* at 1373). My colleagues and I have been

1. Consider the words of a government attorney who prosecuted Maloney:

As a judge [Maloney] was tough and hard-nosed. Many prosecutors liked working in his courtroom because he was tough and hard-nosed. But one of the things that I have heard over and over again from lawyers in the community is that he took it far too far; that he was ruthless; that he heartlessly meted out sentences without any compassion. [T]he only time there was compassion that we can see has to do with the times in which money was being passed.

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discussing Maloney's bribetaking as just another "bias" or "influence," something external to his personality, or at least some severable part of it, that at most "might" have given him the "incentive" to behave in a particular fashion on occasions when he was not bribed. But there is a more malevolent side to Maloney's offense that cannot be ignored. Maloney's bribetaking removes him from the category of the "average" man we addressed in *Del Vecchio*. We are speaking in this case about what motivates a criminal, and this implicates a far darker set of impulses than we confront in the usual bias case. The question we should be asking ourselves is not what impact the lack of a bribe had on Maloney's decisionmaking in a particular case, but what his willingness to accept a bribe tells us about his view of judging. Maloney proved himself willing to acquit defendants charged with capital offenses for a few thousand dollars. The victims of those crimes, their families, the people of Illinois, the concept of justice, were apparently worth no more to him. Why should we assume that defendants were worth anything more to Maloney? How, in particular, can we trust Maloney to have treated a defendant fairly when that defendant had not offered him any money? If due process means anything, I think we must assume that Maloney's corruption pervaded his work as a judge. The Supreme Court could not have put it more clearly: "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 264, 263, 106 S.Ct. 617, 622, 88 L.Ed.2d 698 (1986).²

(N.D.Ill. July 21, 1994) (remarks of Assistant United States Attorney Scott Mendeloff).

2. I recognize, of course, that there are prosecution-minded judges and defense-minded judges and that although these predispositions can have a very real impact on the kind of trial the parties receive, we ordinarily do not recognize this bias as a constitutional deprivation. *See ante* at 688; *see also Del Vecchio*, 31 F.3d at 1390-91 (Rosenbrook, J., concurring). Judges are, after all, human beings, and we dare not fool ourselves into thinking that any judge can completely divorce herself from her own experiences and predispositions. *Id.* at 1372 (majority); *see also Benjamin*

5.

Eighteen judges of the Cook County Circuit Court have been convicted of corruption in the last decade. We would like to think that rampant corruption on the Cook County bench is a relic of the past. But it will not be, it cannot be, so long as we refuse to recognize just how fundamentally at odds this corruption is with the constitutional guarantee of due process. Like Terrence Hake, who risked his own career to expose the criminals clothed in the robes of judges, we too have a role to play in restoring integrity to the bench. We cannot embrace the judicial services of outlaws without deepening the stain their crimes have already left on our courts.

I respectfully dissent.



Sandra BAREFIELD, Eddie Benoit, Dave W. Bennett, et al., Plaintiffs—
Appellants,

V.
VILLAGE OF WINNETKA, an Illinois
municipal corporation, Defendant—
Appellee.

No. 95-3301.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 8, 1996.

Decided April 15, 1996.

Rehearing Denied May 28, 1996.

Police officers and civilian dispatchers brought state court action against village

Although Maloney's crimes reveal no fealty to his oath as a judge, my colleagues nonetheless refuse to relinquish the presumption that he acted fairly when not bribed. The notion that "a judge who accepts bribes in some cases is corrupt in all" is not "a sufficiently compelling empirical proposition," they say, to treat this case as if the government had bribed Maloney to convict the petitioners. *Ante* at 690. But this is not an empirical matter. We cannot assign a value of x to a judge's ability to be fair, divide it by y (representing Maloney's bribe taking), and determine whether the result is less than the constitutionally minimal level of impartiality, z . Like so many other elements of our democracy, justice requires a leap of faith: faith that the defendant is in fact presumed innocent until proven guilty beyond a reasonable doubt; faith that the prosecutor and defense counsel alike will act as zealous advocates for their principals within the confines of law and ethics; faith that the trial judge will favor no party but will strive "to hold the balance nice, clear, and true between the state and the accused." *Turney*, 273 U.S. at 502, 47 S.Ct. at 444. Maloney's crimes shatter that faith. We have no reason to believe that had Bracy and Collins possessed sufficient funds and willing attorneys, they could not have bought acquittals from Maloney. That alone suggests that Maloney's was not the court of "law" to which Bracy and Collins were entitled as the forum for their trial. We do have reason, based on Swano's testimony, to believe that Maloney's corruption extended beyond the cases in which he accepted a bribe, and that Maloney saw unfettered cases as an opportunity to "screw" the defendant and thereby further his own ends as a bribe taker. No "empirical" proof is necessary to demonstrate that the petitioners did not stand equal before the law in Maloney's courtroom.

N. Cardozo, *The Nature of the Judicial Process* 148-49 (Yale Univ. Press 1921). But the distinction between the honest judge, who labors to varying degrees of success to rise above his prejudices, and the dishonest judge, who willingly abandons his oath and yields to the coarseness of his nature, cannot be overstated. We simply have no business assuming that a judge who is willing to acquit an accused murderer for a few thousand dollars will make any effort to protect

Our own ability to monitor the influence of the trial judge, and to discern the taint of the rights of a defendant who has not greased his palm.

3. In this case there were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the petitioners' motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses;

1996) (Ripple, J., concurring), supplemented on reh'g, 70 F.3d 955, petition for cert. filed (Jan. 16, 1996) (No. 95-7444). The state has never cited *Teague* as a defense to the petitioners' claim of judicial corruption, and I am not convinced that the circumstances of this case warrant our sua sponte reliance upon it as an alternate basis for denying the petitioners the relief they seek. *See Stewart* at 304 (concurring) ("Because, in a capital case, invocation of *Teague* can often mean the difference between life and death for the petitioner, we need to be particularly circumspect as to when we shall invoke *Teague* sua sponte."). The majority offers no reason why *Teague* is particularly apposite here, and I discern none. Since when is it news that the accused has the right to be tried before an honest, impartial judge? I had rather thought that to be a cornerstone of our system of justice. And indeed, Supreme Court precedent reveals the notion to be anything but novel. The Court's 1927 decision in *Tumey*, for example, holds that when a judge has a financial incentive to see the defendant convicted, he is not sufficiently impartial for constitutional purposes. 273 U.S. at 531-35, 47 S.Ct. at 444-45. This case is, in a real sense, but a factual variant of *Tumey*. I grant that no court has yet found it necessary to hold that a judge engaged in serial bribetaking is not the impartial adjudicator that the Constitution requires, and in that respect one might argue that the rule the petitioners posit "was not dictated by precedent existing at the time [their] conviction[s] became final." *Casper v. Bohlen*, — U.S. —, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) (quoting *Teague*, 499 U.S. at 301, 109 S.Ct. at 1070) (emphasis in *Teague*). But surely common sense counts for something in the *Teague* analysis. The Greyford prosecutions had not yet taken place in 1981 when Bracy and Collins were tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison, not on the bench. There is, in short, nothing surprising in the petitioners' claim. The prospect of retrying Bracy and Collins (not to mention other defendants convicted by or before Maloney) is an onerous one for the State, but that burden has nothing to do with

BAREFIELD v. VILLAGE OF WINNETKA

Civ. No. 91-734 364 (7th Cir. 1994)

seeking overtime pay, under terms of employee manual and under Fair Labor Standards Act (FLSA), for time spent in roll call prior to their shifts. Village removed action to federal court. The United States District Court for the Northern District of Illinois, James B. Zagel, J., entered summary judgment for village. Officers and civilian dispatchers appealed. The Court of Appeals, Eschbach, Circuit Judge, held that: (1) officers and civilian dispatchers had no contractual right to overtime pay for attending roll call; (2) village qualified for FLSA overtime exemption applicable to agencies that have established work period of seven to 28 days for law enforcement employees, even though village's 28-day schedule predated enactment of statute containing exemption; and (3) village was not required by FLSA to pay overtime to civilian employees for 15-minute periods spent in roll call prior to beginning of their shifts, since village could offset their paid meal time against time spent in roll call.

Affirmed.

1. Federal Courts — 776
Court of Appeals would review de novo the district court's rulings on cross motions for summary judgment, resolving all reasonable inferences in favor of nonmoving party. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

2. Municipal Corporations — 226(4)
Under Illinois law, for village employees to prevail on claim that they had contractual right to compensation for time spent at roll call prior to beginning of their shifts, they were required to establish that employment manual created enforceable contract and that this contract mandated right to payment for time spent in roll call.

Affirmed.

1. Federal Courts — 776

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3. Master and Servant — 2-1

Under Illinois law, for employee policy statement to be contract enforceable against employer, first, language of statement must contain promise clear enough that employee would reasonably believe that offer has been made, second, statement must be disseminated to employee in such manner that employee is aware of its contents and reasonably believes it to be offer, and, third, employee

must accept offer by commencing or continuing to work after learning of statement.

4. Contracts — 29

Under Illinois law, whether contract exists is question of law.

5. Master and Servant — 4

Under Illinois law, test established in *Duddaloo v. St. Mary of Nazareth Hospital*, for determining whether employee policy document is contract enforceable against employer, determines whether implied-in-fact contract exists.

6. Contracts — 27

Under Illinois law, implied-in-fact contract requires meeting of the minds.

7. Contracts — 27

Under Illinois law, implied contract arises where intention of parties is not expressed, but agreement in fact creating obligation is implied or presumed from their acts, or in other words, where circumstances under common understanding show mutual intent to contract.

8. Contracts — 27

Under Illinois law, contract implied in fact must contain all elements of express contract, and there must be meeting of the minds.

9. Municipal Corporations — 186(5)

Under Illinois law, police officers and civilian dispatchers had no contractual right pursuant to employee manual to overtime pay for attending 15-minute roll call prior to their shifts; manual stated that only 30 minutes or more beyond regular hours would be considered overtime, and, even assuming that manual created enforceable contract, any such contract was formed on the premise that roll call would not be paid activity.

10. Labor Relations — 1511.1

Public agency bears burden of establishing that it qualifies for Fair Labor Standards Act (FLSA) overtime exemption applicable to agencies that have established work period that lasts from seven to 28 days for employees engaged in law enforcement or fire protection activities. Fair Labor Standards Act of 1938, § 7(b), 29 U.S.C.A. § 207(b).

(16) Plaintiff has demonstrated issues of fact sufficient to preclude summary judgment on her second retaliation claim with respect to some of her other allegations of adverse employment actions, however. Specifically, plaintiff offered evidence that her desk was searched at work and that property was removed from it. Plaintiff also alleges that she was subjected to numerous ad hoc meetings concerning her PPR and work performance and that false information and open door policy information was put in her shield. Further, there is a material issue of fact as to whether or not plaintiff was intimidated or coerced in an effort to have her sign inaccurate statements about her work performance at these meetings. Defendant has not offered legitimate and nondiscriminatory reasons for such actions, provided that plaintiff can establish they occurred.¹¹

IV. Summary. Defendant's motion to dismiss some of plaintiff's claims for failure to exhaust administrative remedies and to comply with statutes of limitation is denied. Plaintiff's claim of malicious harassment is dismissed for failure to state a claim. Plaintiff has produced no probative evidence creating issues of fact as to whether or not defendant discriminated against her on the basis of age by not granting her requests for promotions. Plaintiff has introduced no probative evidence of age discrimination in relation to any other allegedly adverse employment actions on the part of defendant. Accordingly, defendant's motion for summary judgment on plaintiff's age discrimination claims is granted in full. Plaintiff has, on the other hand, demonstrated the existence of sufficient issues of fact precluding a grant of summary judgment on all her retaliation claims.

Accordingly, defendant's motion for summary judgment is granted in part and denied in part.

IT IS SO ORDERED.



¹² Instead of attempting to articulate legitimate reasons for these actions, defendant asserts that these allegations do not constitute adverse employment actions.

UNITED STATES ex rel. Roger COLLINS, Petitioner,

v.

George WELBORN, Warden, Menard Correctional Center, Respondent.

UNITED STATES ex rel. William BRACY, Petitioner,

v.

Richard GRAMLEY, Warden, Pontiac Correctional Center, Respondent.

No. 93 C 5282, 93 C 5328.

United States District Court,
N.D. Illinois,
Eastern Division.

Aug. 24, 1994.

Opinion Denying Motions to
Alter or Amend Nov. 4, 1994.

Defendants' armed robbery, aggravated kidnapping, and murder convictions were affirmed, 106 Ill.2d 237, 87 Ill. Dec. 910, 478 N.E.2d 267, by the Illinois Supreme Court. The trial court's denial of postconviction relief was also affirmed, 606 N.E.2d 1137. Defendants sought federal habeas corpus relief. On motion to deny defendants' petitions, the District Court, Hart, J., held that: (1) Illinois statute providing that death sentence is subject to automatic review did not excuse defendants' procedural default of claims alleging fundamental error; (2) defendants could not conduct discovery as to alleged accomplice's recantation of trial testimony; (3) prosecutors did not engage in misconduct warranting relief; (4) evidence was sufficient to sustain convictions; (5) discovery as to alleged bias of wife of judge who had previously sentenced one defendant was not warranted; (6) refusal of continuance prior to sentencing phase was not erroneous; and, on employment action. Contrary to defendant's position, these alleged actions obviously concern the terms and conditions of plaintiff's employment.

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Cite as 648 F.Supp. 950 (N.D.Ill. 1994)

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6. Habeas Corpus ¶405.1

Habeas corpus petitioners' claim that denial of constitutionally guaranteed access to courts constituted cause excusing procedural default of certain claims would not be considered absent allegations as to what legal resources were unavailable where petitioners were incarcerated.

7. Prisons ¶413

Lack of legal resources at prison generally will not constitute unconstitutional interference with access to courts where prisoner also has assistance of counsel. U.S.C.A. Const.Amend. 6.

8. Criminal Law ¶1134(3)

Habeas Corpus ¶385

Illinois statute providing that death sentence is subject to automatic review by Supreme Court did not preclude finding that certain claims of fundamental error have been waived; Supreme Court was not required to decide all possible issues that could be raised on direct review of capital case and Court would not be presumed to have decided issues that were not presented to or discussed by that Court. S.H.A. 720 ILCS 5/9-10.

9. Criminal Law ¶1028, 1063(1)

Under Illinois law, to preserve issue for appeal from criminal conviction, even in capital cases, issue generally must be raised at trial and also presented in motion for new trial pursuant to statute. S.H.A. 725 ILCS 5/116-1.

10. Habeas Corpus ¶403

If state procedural bar of particular issue is not applied with regularity and consistency, it will not preclude raising issue in federal habeas corpus petition.

11. Habeas Corpus ¶453

Errors of state law are not basis for granting federal habeas corpus relief.

12. Habeas Corpus ¶453

Allegedly incorrect application of state law does not become basis for habeas corpus relief simply by recharacterizing it as equal protection violation because some defendants

1. Habeas Corpus ¶380.1

District court may ordinarily only consider habeas corpus claims of state prisoners if those claims have, without procedural default, first been fairly presented to state's highest court.

2. Habeas Corpus ¶401, 404

Procedural default will not preclude consideration of state prisoner's habeas corpus claim if cause for default and actual prejudice is shown or if failure to consider claim would be fundamental miscarriage of justice.

3. Habeas Corpus ¶406

Constitutionally ineffective assistance of counsel can constitute cause for procedural default which allows district court to hear habeas corpus claim, but ineffective assistance of counsel claim cannot be used as cause unless claim has first been presented as independent claim in state court. U.S.C.A. Const.Amend. 6.

4. Habeas Corpus ¶406

Ineffective assistance of postconviction counsel cannot constitute cause excusing procedural default, even if postconviction proceedings are first opportunity that claim may be raised, as there is no constitutional right to counsel on postconviction review. U.S.C.A. Const.Amend. 6.

5. Habeas Corpus ¶406

If issue was procedurally defaulted for postconviction review because not preserved by trial counsel or counsel presenting direct appeal, ineffective assistance of trial or appellate counsel can constitute cause excusing procedural default. U.S.C.A. Const.Amend. 6.

have different law applied to them. U.S.C.A. Const.Amend. 14.

13. Habeas Corpus ¶403

Allegedly inconsistent behavior of state Supreme Court in failing to find that prosecutor's closing remarks constituted plain error even though no contemporaneous objection was made did not excuse procedural bar to habeas corpus petitioner's claims based on remarks, despite fact that prosecutorial recantation was found to be plain error without contemporaneous objection in one other case, where remarks made in other case were different than in instant case.

14. Courts ¶1004(1)

Supreme Court's *Batson* decision dealing with discrimination in state's use of peremptory challenges did not apply in instant case, as *Batson* was decided after direct review in instant case had been completed.

15. Habeas Corpus ¶380.1, 382

Failure to fairly present claim to state court, including fairly presenting operative facts, constitutes procedural default barring presentation of claim on federal habeas review.

16. Habeas Corpus ¶407

Discovery of new evidence may, under certain circumstances, constitute cause excusing habeas corpus petitioner's failure to raise particular issue before state courts.

17. Criminal Law ¶998(14.1)

Under Illinois law, delay in filing postconviction petition will be excused if it was not due to defendant's culpable negligence. S.H.A. 725 ILCS 5/12-1.

18. Habeas Corpus ¶431

Absent showing by state that state courts would excuse habeas petitioners' delay in raising issue of witness's recantation in postconviction petition, on grounds of new evidence, district court would presume that no remedy was still available in state court at time new evidence was discovered.

19. Habeas Corpus ¶491

Introduction of perjured testimony at trial is not, by itself, constitutional violation that will support granting of habeas corpus

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30. Habeas Corpus ¶495

Impeachment of defense witness regarding her alleged attempt to obtain public aid in two states was not basis for granting habeas corpus relief, as prejudice was minimal where witness was also impeached on basis of convictions for three counts of robbery and one of misdemeanor theft.

31. Habeas Corpus ¶341

Habeas petitioner waived argument that state, in its closing argument, improperly sought to link petitioner with crimes committed by codefendant in different state, where issue was never raised in state courts and no argument in support of it was made in response to state's motion to dismiss habeas petition.

32. Criminal Law ¶720(2)

State's misstatement in closing argument that no prosecution witness had been asked about individual who defendants claimed was participant in crime, where one witness had been asked about that individual, did not unconstitutionally prejudice defendants; whether witness was asked about individual was not key fact, especially since witness denied having any knowledge of individual.

33. Habeas Corpus ¶497

State prosecutor's discussion of reasonable doubt during closing argument was not unconstitutional misstatement of government's burden of proof warranting habeas corpus relief, even though argument was not definition of reasonable doubt contained in jury instructions. U.S.C.A. Const.Amend. 6, 14.

34. Criminal Law ¶719(1)

Prosecutor's reference, in closing argument, to facts not in record is improper.

35. Habeas Corpus ¶497

Prosecutor's vouching for state's witnesses or for evidence is not sufficient to warrant habeas relief; relief will not be granted unless remarks are so inflammatory and prejudicial that trial is unfair and unless statements likely changed outcome of trial.

relief; there is only constitutional violation if prosecution knowingly used perjured testimony.

20. Habeas Corpus ¶491

Alleged accomplice's purported recantation of testimony did not support conclusion that state knowingly used perjured testimony, such that habeas relief was warranted, as recantation was not substantially different from trial testimony but merely tended to impeach accomplice's credibility.

21. Habeas Corpus ¶488

Good cause for conducting discovery as to witness's purported recantation of testimony did not exist, upon habeas corpus petition, where investigator for one defendant had spent 25 hours talking to witness, witness's sworn statement was taken, and deposition was partially taken without developing substantial recantation. Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C.A. foll. § 2254.

22. Habeas Corpus ¶383

Habeas petitioners' claims that prosecutorial misconduct violated Federal Constitution were not waived because of failure to fairly present claims to state Supreme Court; although petitioners cited only state cases to support prosecutorial misconduct claim before state court, claim was in mainstream of federal constitutional litigation and references to due process and right to fair trial were sufficient to inform state Supreme Court that claims were constitutionally based. U.S.C.A. Const.Amend. 6, 14.

23. Criminal Law ¶1134(2), 1137(8)

In determining whether prosecutorial misconduct is so prejudicial as to deprive defendant of fair trial, court considers whether misconduct was invited by conduct of defense counsel, whether objections were sustained, and whether any corrective or related instructions were given.

24. Criminal Law ¶338(7)

Evidence that witness is in protective custody may be relevant, but should be used cautiously.

36. Criminal Law §720(1)

Prosecutor's closing argument that he would not jeopardize his license by suborning perjury was unnecessary and improper, but was not so inflammatory and prejudicial as to deny habeas petitioners fair trial, in light of defense counsel's argument implying that prosecutors knowingly solicited perjured testimony from their colleagues.

37. Constitutional Law §268(8)

Criminal Law §719(1, 3), 723(1)

Neither prosecutor's remarks in closing argument referring to witness's statement that was not before jury, and to voir dire outside jury's presence, nor putting forth theory that it was defense attorneys' duty to defend guilty killers and that they sought to lie to, mock, and demean jury, nor statement that prosecutors would not be prosecuting case or presenting certain evidence if they did not personally believe defendants had committed crime, were so egregious as to constitute due process violation, where jury was instructed that attorneys' arguments were not evidence and evidence was so strong that improper argument did not likely affect outcome of trial. U.S.C.A. Const. Amendments, 5, 14.

38. Habeas Corpus §497

To constitute error warranting habeas corpus relief, alleged prosecutorial misconduct during closing arguments of sentencing phase must so infect sentencing proceeding with unfairness as to violate due process. U.S.C.A. Const. Amendments, 5, 14.

39. Criminal Law §726

Prosecutor's remarks during closing argument of sentencing phase which compared jury's duty to follow law related to death penalty and fighting of war and killing in line of service did not violate due process, as remarks, though a "bit dramatic," were made in response to defense counsel's reference to commandment "thou shalt not kill" in Bible. U.S.C.A. Const. Amendments, 5, 14.

40. Criminal Law §1114(1)

Information outside record is not to be considered in determining sufficiency of evidence to sustain conviction; such information

will only be considered as basis of some other independent claim.

41. Homicide §234(11)

Evidence was sufficient to sustain murder convictions, despite alleged deficiencies and contradictions in testimony of key witness, as testimony was highly corroborated by weapons and physical evidence, independent witnesses placed defendants in presence of victims, independent witness heard shots fired, and defendant's alibi testimony was not convincing.

42. Homicide §343

Even if armed robbery convictions were reversed due to lack of sufficient evidence, death sentences on murder charges did not necessarily need to be vacated on grounds that robbery convictions were considered as aggravating factors; defendants were also convicted of aggravated kidnapping, which could support felony-murder basis for death sentences, and evidence of other alternatives for imposing death sentences could render vacating robbery convictions harmless error.

43. Robbery §24.15(2)

Evidence, including alleged accomplice's testimony that he was told that \$1,800 had been taken from murder victims and that he received \$125 of proceeds, was sufficient to sustain defendants' armed robbery convictions.

44. Habeas Corpus §775(2)

Fourth Amendment claims are not cognizable on federal habeas corpus petition if state has provided full and fair opportunity to litigate issue. U.S.C.A. Const. Amend. 4.

45. Habeas Corpus §775(2)

Habeas petitioner failed to establish claim that judge who heard suppression motion was corrupt, thus, petitioner could not argue that certain photographs were seized in violation of Fourth Amendment, as petitioner had full and fair opportunity to litigate issue before state court. U.S.C.A. Const. Amend. 4.

46. Habeas Corpus §385

Fairly presenting claim on direct appeal from state conviction will exhaust claim and

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preserve it for federal habeas corpus relief, even if state court fails to expressly address issue in its opinion.

47. Habeas Corpus §337, 365

Habeas petitioners waived argument that continued presence of appellate court judge's wife on jury, after introduction of evidence that appellate judge had sentenced one of defendants when that judge served on lower court, was erroneous, except as to ineffective assistance of counsel claims, where petitioners failed to object at time evidence was introduced and failed to adequately present issue on motion for new trial. U.S.C.A. Const. Amend. 6.

48. Criminal Law §641.13(1)

In order to succeed on ineffective assistance of counsel claim, it must be shown both that attorney's performance was deficient and that deficiency prejudiced petitioner. U.S.C.A. Const. Amend. 6.

49. Criminal Law §641.13(1)

On ineffective assistance of counsel claim, it is presumed that counsel performed competently, and presumption can only be overcome by specific acts or omissions that fell outside wide range of professionally competent assistance. U.S.C.A. Const. Amend. 6.

50. Criminal Law §641.13(1)

To satisfy prejudice component of ineffective assistance of counsel claim, petitioner must have been prejudiced in causal sense, such that there is sufficient probability that error affected outcome, and result of proceeding must have been fundamentally unfair or unreliable due to deprivation of substantive or procedural right to which petitioner was entitled. U.S.C.A. Const. Amend. 6.

51. Jury §97(1)

Whether particular juror was biased is generally factual question.

52. Habeas Corpus §770

On habeas review, district court must defer to factual determinations of state court unless statutory exception is satisfied, but this does not preclude application of conclusive presumption of juror bias where appropriate. 28 U.S.C.A. § 2254(d).

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53. Habeas Corpus §770

Whether juror's partiality may be conclusively presumed from circumstances is question of federal law on which district court hearing habeas corpus petition does not defer to state courts.

54. Jury §132

Juror bias will only be presumed in extreme and exceptional circumstances.

55. Habeas Corpus §688, 750

Habeas petitioners were not entitled to discovery and evidentiary hearing on claim that continued presence of juror who was married to judge who had once sentenced one of petitioners, after evidence concerning that judge was introduced, was erroneous; there was no dispute as to prior conviction for which judge sentenced petitioner, and it was not highly likely that juror was influenced by knowledge that her husband had given petitioner lengthy sentence.

56. Jury §108

Venuepersons who state that they could not impose death penalty may properly be excluded from jury in capital murder case.

57. Jury §108

Venueperson in capital murder case was properly struck for cause where venueperson's responses to questions about death penalty were equivocal, venueperson indicated doubts as to whether he could participate in deciding capital case, and venueperson ultimately answered that it was "probably true" that he could not consider death penalty.

58. Habeas Corpus §770

Factual findings as to juror's ability to follow instructions in light of juror's views on capital punishment are findings of fact to which deference is owed. 28 U.S.C.A. § 2254(d).

59. Habeas Corpus §479, 486(5)

Habeas corpus relief was not warranted by trial court's refusal to grant continuance prior to sentencing phase of trial or alleged ineffective assistance of counsel for failing to present mitigating evidence, where petitioner failed to point to any mitigating evidence that he would have presented had a continuance

been granted or had his counsel been effective. U.S.C.A. Const. Amend. 6.

60. Habeas Corpus §479

In order to succeed on habeas claim based on denial of continuance, petitioner must satisfy ordinary abuse of discretion standard that would apply on direct review and denial of continuance must also have rendered proceeding fundamentally unfair; analysis must be conducted in light of need for continuance and any actual prejudice resulting from denial.

61. Habeas Corpus §770

Issue of whether denial of continuance resulted in fundamentally unfair trial warranting habeas corpus relief is mixed question of law and fact; deference is owed to any state court findings of fact.

62. Criminal Law §566

Trial court is entitled to broad discretion on matters of continuance.

63. Habeas Corpus §406

Habeas petitioner's failure to present claim in postconviction petition that failure to adequately develop record for direct appeal, as to mitigating circumstances, was due to ineffective assistance of trial counsel and/or appellate counsel waived ineffective assistance claim for use as cause in excusing failure to develop record. U.S.C.A. Const. Amend. 6.

64. Habeas Corpus §365

Habeas petitioner could not claim prejudice due to denial of continuance before sentencing proceeding, if success on claim required presentation of evidence outside of record, where claim was not made in postconviction petition, nor were facts supporting prejudice alleged in that petition.

65. Criminal Law §598(2)

Trial court's denial of continuance before sentencing phase of murder trial was not erroneous, as defense counsel should have been aware that state would seek death penalty, counsel had opportunity to speak to defendant and his family to develop mitigating evidence, trial court was not informed that counsel wished to develop evidence, and

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factors to be considered did not violate constitution. Ill. Rev. Stat. 1977, ch. 38, § 9-1.

73. Constitutional Law §250.2(3)

Criminal Law §1208.1(6)

Fact that Illinois law as to burdens of persuasion in death penalty cases may have changed over the years did not support equal protection claim. U.S.C.A. Const. Amend. 14; Ill. Rev. Stat. 1977, ch. 38, § 9-1.

74. Habeas Corpus §377

Habeas petitioners' failure to present claim that trial judge accepted bribes in other cases and was thus biased toward prosecution in petitioners' cases, until appeal from denial of postconviction relief, was excused where information regarding alleged bribes did not become public until that time.

75. Habeas Corpus §365

Habeas petitioners waived claim that judge who presided over postconviction proceedings was biased toward state because he accepted bribes from defendants in other cases, where claim was not raised until supplementary habeas petition even though allegations of judge's improprieties surfaced before petitioners even filed their postconviction petitions.

76. Criminal Law §655(1)

Constitutional right to fair trial includes right to trial judge who is neutral, detached, and free from bias. U.S.C.A. Const. Amend. 5, 14.

77. Habeas Corpus §688

Habeas petitioners were not entitled to discovery to determine whether trial judge, who allegedly accepted bribes in other cases, was biased toward state during petitioners' trial, as petitioners failed to show how existence of bias could be established in manner that was not speculative.

78. Criminal Law §700(3)

State's alleged failure to disclose police report which stated that only one piece of rope was found in apartment from which murder victims were kidnapped, even though two pieces of rope were presented at trial, and that alleged accomplice's fingerprints were found in apartment did not constitute

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Brady violation; other reports that were available revealed that only one piece of rope was found, and evidence as to fingerprints did not necessarily impeach alleged accomplice who admitted that he had been in apartment before.

79. Criminal Law §736

Trial court's alleged failure to permit capital murder defendant's counsel to point out that defendants would get life imprisonment without parole if not sentenced to death, in response to prosecutor's argument that defendant would be continuing danger to society if not put to death, was not erroneous, as prosecution argued that petitioners would be dangerous to others at prison or if they escaped from prison and did not raise issue as to being dangerous because released on parole, and counsel for one defendant stated that defendant who was his client would not be back out on street in five to ten years if not sentenced to death.

80. Habeas Corpus §501

Loss of common-law record from trial by habeas petitioners' postconviction counsel did not warrant habeas relief on grounds that record could reveal additional errors; briefs from direct appeal were available and any errors not raised on direct appeal would be waived, mere speculation about potential for finding error was insufficient, and petitioners bore risk of error by their own attorney.

On Motion to Alter or Amend Judgment

81. Habeas Corpus §501

District court's reading of trial transcript without benefit of trial exhibits did not undermine district court's determination, on habeas review, that petitioners' convictions were sustained by sufficient evidence; transcript was understandable without exhibits, and petitioner failed to point to any exhibit for which actual examination was necessary to determine sufficiency of evidence.

82. Habeas Corpus §883.1

Habeas corpus petitioner was not entitled to funds to conduct further discovery related to documents accumulated by private investigator for copetitioner, as to separate murder charges against copetitioner, absent

HART, District Judge.

83. Habeas Corpus 6480 Habeas petitioner's claim that alleged accomplice had one or two prior convictions that were unknown at time of trial did not support claim for relief, absent contention that prosecution knew of convictions at time of trial.

84. Habeas Corpus 6491

Claim that recently discovered police report showed that only one piece of rope was recovered from apartment where murder victims had been held, though two pieces of rope were introduced at trial, did not warrant habeas corpus relief, as there was no reasonable probability that petitioners could have shown that rope evidence presented at trial was fabricated and that such showing would have resulted in their being found not guilty.

Robert H. Farley, Jr., Robert H. Farley, Jr., Ltd., Naperville, IL, Stephen E. Eberhardt, Chicago, IL, for petitioner Collins. Steven J. Zick, Terence Madsen, Chicago, IL, for respondent Wellborn. Gilbert H. Levy, Seattle, WA, Martin Carlson, Chicago, IL, for petitioner Bracy. Terence Madsen, IL Atty. Gen. Office, Chicago, IL, for respondent Granley.

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- 1. The spelling contained in the present petition will be used. The state court record, however, spells his name "Bracy."
- 2. In one of his supplemental petitions, Collins expressly adopts the arguments of Bracy. Where

steal.' According to Nellum, the two vehicles returned to the parking lot at 2240 South State, where Bracy gave him \$125 and told him 'Just be cool.' Nellum then drove with Collins to 31st Street and Lake Michigan, where Collins threw two handguns into the lake. Nellum identified a .38-caliber Charter Arms revolver and a .357 Riggner revolver as the weapons that were thrown in the lake.

"On cross-examination Nellum testified that he did not know the reason for the killings but that he went along for a 'piece of the action.' He also testified that about two months after the murders Hooper told him that \$1,900 had been taken from the victims. His credibility was weakened by his admission that he lies when he has to, although he stated that his testimony and statements to the police had been truthful. Yet, he admitted he lied to the police concerning the location of the two handguns. Following his arrest, Nellum denied any knowledge of the whereabouts of the weapons. Three weeks prior to trial, however, he directed the authorities to 31st Street and Lake Michigan, where the guns were recovered by divers. Nellum also testified that he decided to cooperate after prosecutors informed him they would not charge him with murder, but would instead recommend a three-year sentence in exchange for his guilty plea to three counts of concealing a homicidal death.

"Under further cross-examination, Nellum denied knowing the victim Lacey, and said he could not recall ever having his picture taken with him. The defendants, however, introduced into evidence a series of photographs taken in August of 1980 which showed Nellum and Lacey together with a number of other individuals.

"Daretha Redmond testified that she lived in a first-floor apartment at 2240 South State. Sometime after 10 p.m. on the night of the murders, she saw a group of about five men, two of whom appeared to be tied, walk past her living room window. Approximately one month later, she was questioned by the police and shown about 40 photographs. Redmond testified she identified photographs of Collins, Nellum and Hooper as resembling men that were in the group. She further

testified that the man leading the group wore a wide-brim hat and that he could have been Collins.

"On cross-examination Redmond stated she had never seen Bracy before. She also stated that because she did not see the face of the man who was leading the group, she could not say for certain that she saw Collins on the night of the murders.

"Laverne Lyles testified that in November 1980 she lived in a fifth-floor apartment at 2240 South State. On the evening of November 12, she went grocery shopping with two friends, returning to the parking lot of her building around 10 p.m. Lyles testified she went to her apartment to get a shopping cart for her groceries. As she walked downstairs, she saw Collins on the second-floor landing wearing a 'Spanish type' hat and a long, maroon or burnt-orange leather coat. According to Lyles, Collins was on the apartment side of the stairway door and was closing the door as she approached. Lyles stated she went to her automobile and as she was unloading her groceries from the trunk, she observed three men come out of the building and walk toward the parking lot. One of the men, she said, had his hands tied and had a long handkerchief hanging from his mouth. Lyles further testified that she identified a photograph of Bracy as the man in the lead and a photograph of Pettigrew as the man with his hands bound. She could not identify the third man. She also identified a photograph of Collins wearing a wide-brim hat and said it was the same hat he was wearing when she saw him on the second-floor landing.

"Christina Nowell told the jury that she first met defendant Bracy in May of 1980 at the King Midas Lounge in Chicago. In late August, Bracy came to her home, and she showed him a .38-caliber Charter Arms revolver which she kept in the bedroom. Nowell stated she went to the basement for a short time, leaving Bracy in the room alone. The following day she discovered that her gun was missing. Nowell further testified that, in early September 1980, she was at the King Midas Lounge with Bracy; that a man and woman came to their table; that the woman gave Bracy a brown paper bag con-

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I. FACTUAL BACKGROUND

Collins / summarizes the facts:

"On November 12, 1980, sometime after 10 p.m., Frederick Lacey, R.D. Pettigrew and Richard Hollman were taken from apartment 206 at 2240 South State Street in Chicago, placed in a red Oldsmobile, and driven to a viaduct at Roosevelt Road and Clark Street, where they were shot to death. Police officers investigating at the scene found Lacey lying on the ground on the driver's side of the automobile. Pettigrew was lying partially under the right front bumper with pieces of rope and cloth tied around his right wrists. Three expended shotgun shells were found near his body. Hollman was discovered in the back seat, his hands bound with cloth. The record shows that Lacey had been shot in the back of the head. Pettigrew, in addition to being shot in the face, chest and leg, had four shotgun wounds in his back. Hollman had been shot three times in the chest and once in the back of the neck.

The chief prosecution witness was Morris Nellum, who admittedly took part in the crimes. To secure his testimony, the State agreed to recommend a sentence of three years in protective custody in exchange for Nellum's guilty plea to three counts of concealing a homicidal death. The State also agreed to relocate his family.

"As to the events which occurred on the night of November 12, 1980, Nellum testified as follows. He was with his girlfriend, Regina Parker, at her apartment at 2222 South State Street. At approximately 9:30 p.m.,

Collins came to the apartment and asked him to go to apartment 206 at 2240 South State, saying he had something he wanted Nellum to take care of. Nellum went to that location, arriving approximately 10 minutes later. In one of the bedrooms he observed Collins, Bracey, Hooper, and three men he did not recognize. Two of the men, later identified as Pettigrew and Hollman, were on the bed with their hands bound. The third, later identified as Lacey, was standing at the side of the bed. Collins asked Nellum to drive his (Collins') brown Cadillac to Roosevelt Road and Clark Street because '[Collins] was going to drop some people off, leave them tied up and he wanted me to pick him up.' Nellum took Collins' keys and went to the parking lot outside the building where Collins' Cadillac was parked. He observed Collins, wearing a wide-brim hat, Bracey, Hooper, and the three victims emerge from the building and walk to the red Oldsmobile. The three victims were placed in the rear seat; Collins and Hooper got in the front seat, with Collins driving. Bracey meanwhile went to his own automobile, which was parked nearby. After the two vehicles departed, Nellum waited a few minutes as instructed, and then followed. As he approached the viaduct at Roosevelt Road and Clark Street, he heard a series of shots. Immediately thereafter, he saw Bracey, carrying a sawed-off shotgun, and Hooper run to Bracey's automobile. Collins got in his own car alongside Nellum. As they sped from the scene, Collins said: 'That damn Hooper. I told him to wait until—I wanted to use the shotgun because they can't trace the shotgun, but he used the gun in-

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taining a sawed-off shotgun; and that Bracey 'broke down' the gun and gave it to William Lane, an employee of the lounge, who put the weapon behind the bar.

"On November 25, 1980, she was again at the lounge with Bracey and asked him when he was going to return her revolver. Nowell testified an argument ensued during which Bracey threatened to have her 'wasted.' He then told her 'he had murdered some people with [her gun] and threw it in the Chicago River.'

"The evidence also showed that on December 30, 1980, police officers conducting a search of apartment 206 at 2240 South State found two pieces of rope in a bedroom closet. An expert from the Chicago Police Department Crime Laboratory testified that one of the pieces had the same characteristics as the rope found on Pettigrew's wrist and that they 'could' have come from the same length of rope. The expert admitted, however, that it was a very common type of rope, found in almost any hardware store.

"A firearms expert testified regarding the tests performed on the revolvers recovered from Lake Michigan. The tests revealed that the .38-caliber Charter Arms revolver would mark a bullet with eight lands and grooves to the right while the .357 Riggner revolver would mark a bullet with five lands and grooves to the right. Bullet or bullet fragments bearing the characteristics of at least one of the weapons were found in each victim. However, because of their rusty condition, the expert could not say for certain that the guns fired the bullets taken from the victims. However, the Charter Arms revolver, by use of its serial number, was found to be the gun that had been stolen from Christina Nowell. The expert also testified that the expended shotgun shells found near Pettigrew's body were fired from the same shotgun but that no shotgun was admitted for testing.

"Both defendants raised alibi defenses. In addition, they introduced testimony which suggested that Nellum, Hooper and a man named Jesse were responsible for the crimes.

"Bracy's alibi consisted of the testimony of his sister, Barbara Harris. When she was

asked to recount the events of November 12, the State objected and argued at a sidebar that they had not been informed that Bracey would present an alibi. (Indeed, the record shows that four days earlier Bracey's attorney told the State there would no [sic] be alibi defense.) The court then called a recess to give the State an opportunity to question Harris. When she again took the stand she testified that, at approximately 6 p.m. on the day of the murders, Bracey came to her home and had dinner with her and her husband. According to Harris, her husband went to bed between 7 and 7:30, after which she and Bracey discussed a number of financial matters pertaining to his work as an artist. Bracey, she said, left her home after 11:30 p.m. Under cross-examination, Harris admitted she never told the police, State's Attorney, or anyone else in authority that Bracey was with her on the night of the murders.

"Bracey, testifying in his own behalf, said he had known Nellum, Hooper and Lacey for a number of years and that he had known a man named Jesse for six or seven years. Saying he was at his sister's house until 11:30 p.m. on November 12, he denied being in apartment 206 on the night of the murders. He also denied ever being in Christina Nowell's home or stealing her revolver. According to Bracey, Hooper had Nowell's revolver. As to the November 25 conversation with Nowell regarding her gun, he testified that because he was a friend of Hooper, Nowell approached him in the King Midas Lounge and asked him to tell Hooper to return it. He testified he told her that the matter was between her and Hooper and that he 'didn't have nothing to do with it.' He admitted that an argument ensued and that angry words were exchanged, but denied that he threatened to have her 'wasted.' Supported by the testimony of William Lane, Bracey also repudiated Nowell's assertion that he received a shotgun in the lounge in September of 1980 and gave it to Lane, who put the weapon behind the bar.

"In an apparent attempt to reduce the impact on the jury of his criminal record, Bracey admitted on direct examination that he had three prior convictions, one for rob-

berry and two for armed robbery. Cross-examination revealed that the last conviction resulted from an armed robbery which he committed while an escapee from Stateville Penitentiary. Also on cross-examination, Bracey admitted that he never told the police he was at his sister's when the murders were committed, and that he did not tell them that a man named Jesse was involved in the crimes. He also denied telling the police that he was in the area of apartment 206 on the night of the murders. In rebuttal the State called two police officers who testified that, when questioned, Bracey admitted to being in the area of the apartment on the night of the murders. Bracey then again took the stand and explained that he merely replied affirmatively to the officers' question of whether he had "ever" been in the vicinity of the apartment.

"Collins, also testifying in his own behalf, said he had 10 previous armed-robbery convictions. He also said he knew Nellum, Hooper, Bracey, and Lacey, having met the latter two while in prison. He further testified that on November 12 his brown Cadillac was parked behind the King Midas Lounge, where it had been for several weeks because of mechanical problems, and that he did not get the car running again until November 15 or 16. As a result, on the night of the murders he was driving his 1968 Chevrolet, which he had previously loaned to Sandra Johnson but which was returned to him on November 11.

"Collins recounted that at approximately 3 p.m. on the day of the murders he took his girlfriend, Beatrice Mack, to a nearby clinic. They then went to the apartment of Irene Parker, Mack's mother. Later that evening Collins and Mack went grocery shopping at a nearby A & P, leaving that store between 9:30 and 10 p.m. On the way back to Parker's apartment, they stopped at 2240 South State. While Mack waited in the car, Collins went to apartment 206. According to Collins, only Nellum, Hooper, Derrick Phipps, and Ben Weathers were present. Following a brief conversation, Collins rejoined Mack, and the two returned to Parker's home. There two other individuals who were visiting Parker helped them carry the groceries upstairs, after which they all ate dinner to-

gether. Collins testified that he left the apartment with Mack at approximately 1 a.m. and that they checked into a motel where they remained until the following morning.

"Mack substantially corroborated the events as related by Collins. Her cross-examination revealed, however, that she had been a heroin addict for about five months prior to November 12 and that on the afternoon of the 12th, Collins took her to a clinic where she was undergoing methadone treatment. She also stated that she first dated Collins on November 9, three days before the murders, saying they went to a kung-fu movie at the United Artist Theater in Chicago. In rebuttal the State established that no kung-fu movie was playing at that theater the week of November 9.

"Irene Parker, Carolyn Washington and Randolph Harper all testified they had dinner with Collins and Mack on the night of the murders. Washington and Harper also said that at approximately 10:30 p.m. they helped Collins carry groceries from his blue Chevrolet.

"In an attempt to establish that his Cadillac was inoperable on the night of the murder and therefore could not have been driven by Nellum, Collins called Sandra Johnson and Earl Young to the stand. Johnson, who had known Collins for almost 10 years, told the jury she was driving Collins' blue Chevrolet in early November but that she returned the automobile to him on November 11, prior to leaving for a trip to Michigan. She stated she saw Collins' Cadillac on November 10 or 11 parked behind the King Midas Lounge and upon returning from Michigan on November 13, she again observed the Cadillac parked in the same location. Her credibility may have been weakened, however, by her admission that she had been convicted of three counts of robbery and also of misdemeanor theft. In addition, she stated on cross-examination that she was receiving public aid in Illinois, but denied that the purpose of her Michigan trip was to apply for public aid in that State. In rebuttal a Chicago police officer testified to a conversation with Johnson in which she in-

formed him that she went to Michigan to apply for public assistance.

"Young, the owner of the King Midas Lounge, testified he first noticed a brown Cadillac parked behind his establishment on November 2. Not knowing the owner, he left a note on the windshield four or five days later requesting that it be removed. Three or four days thereafter he saw a number of men, one of whom he identified as Collins, working on the automobile. According to Young, approximately one and a half to two weeks passed after he first observed the Cadillac until it was removed.

"Also testifying for the defendants were Derrick Phipps and Ben Weathers. Both claimed they were in apartment 206 with Nellum and Hooper on the evening of November 12. Bracey, they said, was not present. Around 9:30 p.m., three men, accompanied by a man identified only as Jesse, arrived and went into one of the bedrooms, followed by Nellum and Hooper. Approximately 30 minutes later, Collins arrived looking for Bracey. Upon being informed that Bracey was not present, Collins left the apartment. Shortly thereafter, Phipps and Weathers departed together, presumably leaving Nellum, Hooper, Jesse and the three men in the bedroom.

"The credibility of the witnesses was made vulnerable by the disclosure of their respective criminal records. Weathers admitted he received a 10- to 30-year sentence in 1975 for armed robbery. Phipps pleaded guilty in 1974 to an armed-robbery charge, and in 1976 he received concurrent sentences of 9 to 18 years for attempted murder and 6 to 18 years for armed robbery. (The record also shows—although it was not brought to the attention of the jury—that he was awaiting trial on two additional criminal charges when he testified.) Phipps' credibility may have been further weakened by his inability to give but the vague description of Jesse. Although he claimed he first met Jesse in the Stateville Penitentiary, Phipps could only say

3. Each subheading in Section III will make reference to the particular claims in the petitions: B for Bracey and C for Collins. Citations to claims will be by using the letter and number. *E.g.* B1, C1. Citations to paragraphs of each petition will include the paragraph symbol, *e.g.*

not preclude consideration of the claim if cause for the default and actual prejudice is shown or if failure to consider the claims would be a fundamental miscarriage of justice. *Id.*; *Jenkins v. Grandley*, 8 F.3d 506, 508 (7th Cir.1993). Constitutionally ineffective assistance of counsel can constitute cause. *Coleman*, 501 U.S. at 752-55, 111 S.Ct. at 2566-67; *Budlow v. Dickey*, 847 F.2d 480, 426 (7th Cir.1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1168, 103 L.Ed.2d 227 (1989). However, the ineffective assistance of counsel claim cannot be used as cause unless the ineffective assistance claim has first been presented as an independent claim in the state court. *Murray v. Carrier*, 477 U.S. 478, 488-89, 106 S.Ct. 2089, 2645-46, 91 L.Ed.2d 397 (1996); *Morrison v. Duckworth*, 898 F.2d 1298, 1300 (7th Cir.1990). Petitioners make some general responses as to the waiver of some of their claims. These arguments will be considered here, while arguments specific to particular claims will be discussed as the individual claims are considered.

[4, 5] Petitioners assert that ineffective assistance of postconviction counsel can constitute cause excusing a procedural default. However, there being no constitutional right to counsel on postconviction review, the ineffective assistance of postconviction counsel cannot constitute cause. *Coleman*, 501 U.S. at 752-57, 111 S.Ct. at 2566-68; *Jenkins*, 8 F.3d at 506; *Williams v. Chrusa*, 945 F.2d 926, 932-33 (7th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3002, 120 L.Ed.2d 877 (1992).⁴ This is true even if postconviction proceedings are the first opportunity that the claim may be raised. *Bonta v. Vasquez*, 999 F.2d 425, 429 (9th Cir.1993). However, if an issue was procedurally defaulted for postcon-

4. Petitioners contend that *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), implicitly overrules cases holding that there is no right to counsel on collateral review. Assuming *McCleskey* contains such an implicit holding, petitioners ignore that *Coleman*, 501 U.S. at 752-55, 111 S.Ct. at 2566-67 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2745, 106 L.Ed.2d 1 (1989)), expressly reaffirms that there is no right to counsel on collateral review. *Coleman* was decided after *McCleskey*, as were *Jenkins* and *Williams v. Chrusa*.

Id. at 1306 (quoting Idaho Code § 19-2927). Based on this statute and Idaho case law, the Ninth Circuit held that, regardless of whether it was raised in briefs or expressly discussed in the Idaho Supreme Court's opinion, the Idaho Supreme Court necessarily had decided whether the death sentence had been based on an arbitrary factor and therefore there could be no procedural default on such a claim. Recently, the Eighth Circuit distinguished *Beam*. It held that a Missouri statute that required review of "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," Mo.Rev.Stat. § 565.035.3(1), only required the Missouri Supreme Court to review whether any of the aggravating factors considered by the jury was an "arbitrary factor," and did not mandate review of all instructional and constitutional errors for arbitrariness. *Nave v. Dela*, 22 F.3d 802, 815-16 (8th Cir.1994).

Illinois law provides: "The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court." 720 ILCS 5/9-1(0). This statute is mandated by the Illinois Constitution. Ill. Const. Art. 6, § 4(b) (1970) ("Appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right.") The Illinois Supreme Court has promulgated the following rules. "[A]ppeals by defendants from judgments of the circuit courts imposing sentence of death shall lie directly to the Supreme Court as a matter of right." Ill.Sup.Ct.R. 603. "In cases in which a death sentence is imposed, an appeal is automatically perfected without any action by the defendant or his counsel." *Id.* 606(a).

[9] Unlike Idaho law, or even Missouri law, Illinois law does not mandate that specific issues be considered by the Illinois Supreme Court. The case law is consistent with the statutory provision. Under Illinois law, to preserve an issue for appeal from a criminal conviction, it generally must be raised at trial and also presented in a motion for new trial pursuant to 725 ILCS 5/116-1. *People v. Enoch*, 122 Ill.2d 176, 119 Ill.Dec.

[10] If a state procedural bar of an issue is not applied with regularity and consistency, it will not preclude raising the issue in a federal habeas corpus petition. *Johnson v. Mississippi*, 496 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988). *Johnson* applies prior Supreme Court precedent holding that a "state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Id.* at 587, 108 S.Ct. at 1987 (quoting *Hathorn v. Loomis*, 457 U.S. 255, 262-63, 102 S.Ct. 2421, 2426-27, 72 L.Ed.2d 824 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736 (1964)). The Seventh Circuit has explained what is meant by "ade-

quate review.

quate" and by "strictly or regularly followed."

A state ground is "adequate" only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show the state is discriminating against the federal rights asserted.

A requirement of consistency poses special problems for forfeiture rules, because every state uses exceptions such as "plain error" or "sufficient reason" or even "cause and prejudice" to deal with cases in which application of the ordinary rules would produce unacceptably harsh consequences.

Statements such as the one in *Barr* that a state procedural ground will be respected only when "strictly or regularly followed," 378 U.S. at 149, 84 S.Ct. at 1735, turn out to be too strong, unless the "procedural ground" is understood to be a complex of rules and qualifications. Wisconsin employs a rule that failure to raise a ground forfeits it unless there are "sufficient" reasons. A rule of forfeiture-unless-when the state is scrupulous about treating particular reasons as "sufficient" routinely and others as insufficient with equal regularity.

Searching for "regularity" in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes a waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and the inferior courts respect state procedural grounds unless they are regularly disregarded (or seemingly have been manufactured for the occasion as in *Johnson*). A state ground that is solidly established will be respected even though not "strictly" followed. Any other

7. The particular remarks of the prosecutor are

approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disables the state from enforcing its procedural rules with respect to many others.

Prichoda v. McCaughy, 910 F.2d 1379, 1384 (7th Cir.1990).

[11, 12] It is contended that the Illinois Supreme Court declined to apply plain error in Bracy's and Collins's case, while applying it in other cases. C22-23. It is argued that, in at least two other cases, the Illinois Supreme Court has found error in prosecutors' closing remarks even though those remarks were provoked by arguments of defense counsel. C Reply 58-59 (citing *People v. Monroe*, 66 Ill.2d 317, 5 Ill.Dec. 824, 362 N.E.2d 286 (1977); *People v. Stock*, 56 Ill.2d 461, 309 N.E.2d 19 (1974)). See also C Reply 62 (citing *People v. Brisson*, 106 Ill.2d 342, 88 Ill.Dec. 87, 478 N.E.2d 402, cert. denied, 474 U.S. 908, 106 S.Ct. 276, 88 L.Ed.2d 241 (1985)). It is contended that the application of invited error in *Collins I*, 478 N.E.2d at 287-88, is inconsistent with *Monroe* and *Stock*. The issue of invited error and whether petitioners were prejudiced by these particular prosecutorial arguments⁷ is more in the nature of a substantive ruling than a procedural bar. Errors of state law are not a basis for granting federal habeas corpus relief. *Williams v. Chrone*, 945 F.2d at 956. An allegedly incorrect application of state law does not become a basis for habeas corpus relief simply by recharacterizing it as an equal protection violation because some defendants have different law applied to them. *Bowser v. Boggs*, 20 F.3d 1060, 1065-66 (10th Cir.1994). Also, this case does not involve arbitrary application of the law that might support an equal protection claim. See *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1386 (7th Cir.1994) (en banc). Collins's Claims XXII and XXIII are not cognizable as independent claims.

As to the invited error issue, it is unnecessary to consider whether it is a procedural bar and, if so, whether such a bar has been inconsistently applied. Respondents do not contend that the prosecutorial misconduct is discussed more fully in § IIIIC, *infra*.

for failure to adequately present it to the state courts. Collins Claim I will be denied.

The focus of Bracy's allegations (B159) is that it was erroneous to excuse Cooper for cause. It is conceded that this issue was not raised in the Illinois courts (B160), but it is contended that failure to do so was ineffective assistance of counsel. Neither Bracy nor Collins support this contention. Bracy makes no specific argument as to either the merits of this issue or the alleged ineffective assistance in failing to object at the time Cooper was excused. No grounds for excusing the procedural default is found. Bracy Claim II is held to be waived for failure to raise it in the state courts.

B. Nellum's Testimony—Discovery and a Hearing (B5, B6, C2)

In early 1992, a private investigator hired by Bracy's attorney spent 25 hours interviewing Morris Nellum.⁸ Some of the interview was recorded. In July 1992, Nellum gave a sworn statement before a court reporter to counsel for Bracy. In the interview and in the statement, Nellum said that some of his testimony at Bracy's and Collins's trial was false.

Thereafter, in April 1993, counsel for Bracy partially deposed Nellum in the Arizona postconviction proceedings, but, after answering some questions, without adding to his earlier statements, Nellum declined to continue unless his testimony was taken before a judge. Thereafter, the Arizona court declined to continue the deposition. Petitioners seek further discovery and a hearing to introduce additional Nellum testimony.

Although not stated by Nellum, it is argued that the assistant State's Attorney knew his testimony was false when given,

8. At the time, counsel was representing Bracy in collateral proceedings in a subsequent double murder case in Arizona in which Bracy was also sentenced to death. See *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), cert. denied, 474 U.S. 1110, 106 S.Ct. 498, 88 L.Ed.2d 932 (1986). Nellum had also provided testimony in that case. This counsel now represents Bracy before this court, but in July 1992 another attorney was representing Bracy in the Illinois postconviction

and knowing use of the false testimony is alleged by both petitioners.

In the interviews, statement, and deposition, Nellum does not testify that Collins and Bracy were not involved in the murders. He instead testifies that certain specific statements by him were false. Contrary to his trial testimony, Nellum said that he was beaten by and threatened by the police when he was first arrested and gave an initial statement. See Nellum Stmt. at 10-11, 15, 17-18, 20. He also stated that he was on one side of a two-way mirror adjoining an interrogation room where he saw Bracy being beaten. *Id.* at 14, 18. He states that his testimony that he saw Hooper at the scene of the crime was false.⁹ *Id.* at 12, 19-20. His testimony that he saw Bracy with a shotgun was also said to be false. *Id.* at 22-23. He confirmed his testimony that he saw Collins with guns and that he was in a car with Collins. *Id.* at 23. He also testified that the assistant State's Attorney helped him get a job with musicians. This was after the trial and not promised prior to the conclusion of the trial. See *id.* at 23-24. Earlier in 1992, he told the private investigator that he never heard any gunshots and that he did not see Collins and others lead the murder victims to the car. This recantation was not repeated in his sworn statement or partial deposition.

[16] Respondents primarily argue that recantation issues have been waived because not presented to the Illinois courts. The 1992 statements of Nellum occurred after the opening brief had already been filed in the postconviction appeal. Postconviction counsel raised the issue of recantation by Nellum for the first time in a reply brief, but that section of the brief was stricken and the issue is not discussed by the Illinois Supreme Court. See *Collins II*. Petitioners do not proceed, which was then being briefed on appeal.

10. Citations are to the July 1992 statement which is exhibit C to Collins's Reply and exhibit B to Bracy's habeas petition.

11. In the statement, this answer is referred to as being inconsistent with testimony at Hooper's trial and inconsistent with testimony at Bracy's and Collins's trial.

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sue to which invited error was applied has been waived because of any procedural bar. Instead that issue is addressed on the merits and will be discussed below.

[13] It is also contended that the Illinois Supreme Court has been inconsistent in applying the plain error rule to prosecutorial remarks for which there were no contemporaneous objections. See C Reply 59-64. Only one case is cited where prosecutorial remarks were held to be reversible error even though no contemporaneous objection had been made. See *People v. Holman*, 103 Ill.2d 133, 82 Ill.Dec. 585, 602-07, 469 N.E.2d 119, 136-41 (1984), cert. denied, 469 U.S. 1220, 105 S.Ct. 1204, 84 L.Ed.2d 347 (1985). The prosecutorial remarks involved in that case and the cases cited therein, see *id.*, 469 N.E.2d at 140-41, are different from those involved in the present case. The Illinois Supreme Court may find plain error as a result of certain prosecutorial remarks without finding it in different remarks without being legally inconsistent. Petitioners have not made a showing of freakish application that would satisfy the standard set forth in *Prichoda*. The Illinois Supreme Court did not rely on any procedural bar that was inadequate.

III. GROUNDS ASSERTED FOR RELIEF

Each petitioner has raised a number of issues. Bracy has divided his petition into 17 separate claims and Collins has divided his petition into 23 claims plus an additional 14 that he seeks to raise in three supplemental petitions.¹⁰ Most issues have been raised by both petitioners. Therefore, each petitioner's contentions will be considered together, with all applicable arguments being considered as to each petitioner. All issues raised will be considered. The claims are addressed in the order set forth in Collins's petition, the lower numbered case.

A. Exclusion of African-Americans from Jury (B2, C1)

It is alleged that the venire of 60 potential jurors contained 5 or 6 African-Americans. C1396. Over objection, one African-American

8. Leave is granted to file the supplemental petitions.

can, Harry Cooper, was excused for cause because of commitments to his Little League team. C1397-98; B159. At the time, no other African-Americans were among those under consideration for the jury. C1399. The State exercised its peremptory challenges as to two African-American venirepersons. C1401-02. The allegations do not specify whether any African-Americans were members of the jury that was impaneled.

[14] Since decided after direct review in this case had been completed, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), is inapplicable to petitioners' claims. *Williams v. Chrone*, 945 F.2d at 942-46. Petitioners (through Collins, C Reply 13-14) contend they can show systematic exclusion of African-Americans that is prohibited by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). On postconviction review, the Illinois Supreme Court denied this claim on the ground that Bracy and Collins "did not raise any claim of the case-by-case exclusion of blacks required by *Swain* nor have they submitted any affidavits or made any sort of showing of this practice." *Collins II*, 180 Ill.Dec. at 64, 606 N.E.2d at 1141.

[15] Failure to fairly present a claim to the state court constitutes a procedural default barring the presentation of the claim on federal habeas corpus review. See *Vendin v. O'Leary*, 972 F.2d 1467, 1472-73 (7th Cir. 1992). This includes fairly presenting the operative facts. *Keeney v. Tomago-Reyes*, — U.S. —, 112 S.Ct. 1715, 1719, 118 L.Ed.2d 318 (1992); *Vendin*, 972 F.2d at 1474. The *Swain* claim has been procedurally defaulted. However, such default will be excused if cause and prejudice can be shown. See *Coleman*, 501 U.S. at 750, 111 S.Ct. at 2565. Petitioners (through Collins, C Reply 14-15) contend cause can be shown by the ineffective assistance of postconviction counsel. Ineffective assistance of postconviction counsel cannot constitute cause. See *Coleman*, 501 U.S. at 752-57, 111 S.Ct. at 2566-68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrone*, 945 F.2d at 932-33; *Bonin*, 999 F.2d at 429. The *Swain* claim has been waived

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dispute that this issue has never been adequately presented to the Illinois Supreme Court and that an argument can be made that it is too late to do so now. They contend, however, that it was newly discovered evidence and therefore cause exists for not having previously presented it to the Illinois Supreme Court. There is no contention by respondents that the information could have been discovered sooner had due diligence been exercised. The discovery of new evidence may, under certain circumstances, constitute cause. *Cf. Murray*, 477 U.S. at 498, 106 S.Ct. at 2646; *Cornell v. Niz*, 976 F.2d 376, 380 (8th Cir.1992) (*en banc*), cert. denied. — U.S. —, 113 S.Ct. 1820, 123 L.Ed.2d 460 (1993). Here, however, the newly discovered evidence is in the nature of a partial recantation of peripheral facts which are independently supported by other testimony and exhibits.

[17, 18] Ordinarily, state court remedies must first be exhausted. The time for filing a postconviction petition had already expired at the time the new evidence was discovered. See 725 ILCS 5/122-1. The delay, however, will be excused if it was not due to the defendants' culpable negligence. *Id.* Respondents, though, do not point to any direct precedent that the Illinois courts would excuse the delay. Therefore, it is presumed that no remedy was still available in state court at the time the new evidence was discovered. *Harris v. DeRobertis*, 932 F.2d at 621.

[19, 20] The introduction of perjured testimony at a trial is not, by itself, a constitutional violation that will support the granting of habeas corpus relief. *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1122 (7th Cir.1991), cert. denied. — U.S. —, 112 S.Ct. 1973, 118 L.Ed.2d 573 (1992). There is only a constitutional violation if the prosecution knowingly used perjured testimony. *Id.*; *Del Vecchio*, 31 F.3d at 1387. Nellum's various statements do not support such a conclusion. Even if this element were satisfied, the recantation must be "substantially different" from the trial testimony and central to the decision in the case. See *Shore*, 942 F.2d at 1124. Mere impeachment generally will be insufficient. See *id.* The question is whether

or the new testimony is substantially different and central to the decision in the case.

The recantation about being beaten and testifying falsely in Arizona only go to credibility. The false statement about whether Nellum saw Hooper at the crime scene is also peripheral to Bracy's and Collins's guilt if Nellum still links Bracy and Collins to the scene. Recanting of the testimony that he saw Bracy and Collins lead the victims to the car and that he heard gunshots does not substantially affect the State's case. Two other independent witnesses put Collins and Bracy at the scene of the abduction. Another independent witness heard the shots and the ballistics evidence strongly supports the use of a shotgun and the weapons found as a result of Nellum's information. Moreover, Nellum still states he picked up Collins at the murder site and does not expressly recant that Bracy was there.

[21] Petitioners seek permission to conduct discovery and hold a hearing, calling Nellum to testify. An investigator spent 25 hours talking to him, a sworn statement was taken by a lawyer for Bracy and a deposition was partially taken without developing a substantial recantation. Under the circumstances, good cause does not exist for permitting further discovery. See Rules Governing § 2254 Cases Rule 6(a); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 269 (7th Cir.) cert. denied, 498 U.S. 878, 111 S.Ct. 209, 112 L.Ed.2d 169 (1990). Hearing additional testimony from Nellum fourteen years after the events is not warranted. Given all the facts and circumstances, additional recantation, which would have little, if any, credibility, could only be cumulative impeachment.

Collins's Claim II focuses on the use of Nellum's allegedly perjurious testimony that he was with Collins when Collins threw the murder weapon in Lake Michigan. It has not been shown that Nellum would now testify that this event did not occur or that the prosecutor knew his contrary testimony at trial was false. On postconviction review, the Illinois Supreme Court addressed the question of the gun in the lake testimony being knowing use of perjured testimony by the prosecutor. It held that "defendants have failed to provide any evidence in support of

their allegation that the prosecution knowingly used perjured testimony.... Even if we were to accept the defendants' position, they were aware of Nellum's inconsistent statements at the time of their direct appeal and they failed to raise a due process challenge at that time. Accordingly, the issue is *res judicata* for purposes of this review." *Collins II*, 180 Ill.Dec. at 665, 606 N.E.2d at 1143. Since Collins Claim II is held to lack merit, it is unnecessary to consider whether it was waived.

C. Prosecutorial Misconduct

(BA, B14, C3)

Petitioners raise issues as to prosecutorial misconduct at three stages of the trial. It is contended that the prosecutors acted improperly by bringing out evidence that certain witnesses had been relocated for protection and by using certain evidence to impeach witnesses. Petitioners also complain about certain prosecution arguments that were used in the prosecution's closing statement and in the prosecution's argument at the death penalty phase.¹²

1. Waiver

[22] Respondents contend that certain prosecutorial misconduct claims are waived because not fairly presented to the Illinois Supreme Court. Respondents argue that the claims presented to the Illinois Supreme Court were only argued on state law grounds and therefore the constitutional variations contained in the present petitions were not fairly presented to the Illinois Supreme Court. Following the Second Circuit, the Seventh Circuit has adopted the following standard as to fair presentation:

If the petitioner's argument to the state court did not: (1) rely on pertinent federal cases employing constitutional analysis; (2) rely on state cases applying constitutional analysis to a similar factual situation; (3) assert the claim in terms so particular as to call to mind a specific constitutional right; or (4) allege a pattern of facts

12. Allegations of prosecutorial misconduct during the presentation of evidence are contained in Collins's petition. Most of the other prosecutorial misconduct claims are contained in both petitions. In any event, to the extent applicable, all arguments are considered as to both petitioners.

that is well within the mainstream of constitutional litigation, then this court will not consider the state courts to have had a fair opportunity to consider the claim. However, the presence of any one of these factors, particularly factors (1) or (2), does not automatically avoid a waiver; the court must consider the specific facts of each case.

Verville, 972 F.2d at 1473-74 (quoting *Daye v. Attorney General of New York*, 696 F.2d 186, 194 (2d Cir.1982) (*en banc*), cert. denied, 464 U.S. 1048, 104 S.Ct. 723, 79 L.Ed.2d 194 (1984)).

Here, petitioners cited only state cases. However, they identified the claims as ones for prosecutorial misconduct and asserted that there were violations of due process or the right to a fair trial. In *Collins I*, the Illinois Supreme Court referred to the right to a fair trial in discussing the prosecutorial misconduct claims before it. Since prosecutorial misconduct claims are in the mainstream of constitutional litigation, references to due process and the right to a fair trial were sufficient to inform the Illinois Supreme Court that the claims were constitutionally based. *Gonzalez v. Combs*, 404 F.2d 201, 206 (2d Cir.1969); *Chisholm v. Henderson*, 736 F.Supp. 444, 446 (E.D.N.Y.1990), *aff'd by unpublished order*, 953 F.2d 635 (2d Cir.1991); *United States ex rel. Boone v. Sandak*, 1992 WL 111089 *2 (N.D.Ill. May 8, 1992); *Stander v. Riley*, 1991 WL 95352 *6 (S.D.N.Y. May 30, 1991). The claims presented to the Illinois Supreme Court have not been waived for failure to fairly present them in constitutional terms.

2. Standard

[23] To be grounds for habeas relief, prosecutorial misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*,

13. The question of waiver as to issues on which no arguments were presented to the Illinois Supreme Court will be considered separately.

prosecutorial misconduct. Cross examination of Mack as to the movie she saw on her first date with Collins and being a heroin addict then on methadone is characterized as collateral, and questioning her about a nose-ring that she did not wear while testifying is objected to as improper. The Illinois Supreme Court held that the trial court acted within its discretion in allowing in the allegedly collateral impeachment. *Collins I*, 478 N.E.2d at 281. As to the question about the nose-ring, to which an objection was sustained, the court stated: "We agree that the question was improper and showed a total lack of professionalism on the part of the assistant State's Attorney; however, we do not believe that it [was] so prejudicial as to deny the defendants a fair trial." *Id.* at 281-82.

[26-28] Errors regarding the admissibility of evidence are generally a matter of state law that are an insufficient basis for granting habeas corpus relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 490, 116 L.Ed.2d 385 (1991); *Romano*, — U.S. at —, 114 S.Ct. at 2011; *Piereson*, 969 F.2d at 1389; *Gacy v. Welborn*, 994 F.2d 305, 316 (7th Cir.), cert. denied, — U.S. —, 114 S.Ct. 269, 126 L.Ed.2d 230 (1993). To support the granting of habeas relief, the evidentiary ruling must implicate a specific constitutional right or the evidence's undue prejudice so greatly outweigh its probative value and likely affect the trial outcome that the defendant was denied a fundamentally fair trial. *Piereson*, 969 F.2d at 1389. A witness's recall of events that occurred the day before the event pertinent to the charges and a witness's addiction to narcotics can be relevant to that witness's credibility. It does not exceed the bounds of the Constitution for a state court to hold that such impeachment was not excludable as collateral. Also, the prosecution's particularized questioning as to Mack injecting the heroin into her arms with needles did not add such undue prejudice to the affliction questioning that a constitutional error was present.

15. The prosecutor asked: "By the way, Miss Witness, I saw you in the hall and you had an

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416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). Accord *Romano v. Oklahoma*, — U.S. —, —, 114 S.Ct. 2004, 2012, 129 L.Ed.2d 1 (1994); *Piereson v. O'Leary*, 969 F.2d 1385, 1387 (7th Cir.), cert. denied, — U.S. —, 113 S.Ct. 168, 121 L.Ed.2d 115 (1992); *Williams v. Chrusa*, 945 F.2d at 949. "It is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471 (quoting the court below). Viewed in the context of the entire case, any misconduct shown must be "so inflammatory and prejudicial to the defendant ... as to deprive him of a fair trial." *Williams v. Chrusa*, 945 F.2d at 949 (quoting *United States v. Chaimson*, 760 F.2d 798, 809 (7th Cir.1985)) (ellipses in *Williams*), and must have "likely changed the outcome of the trial." *Piereson*, 969 F.2d at 1387. This includes consideration of whether the misconduct was "invited" by conduct of defense counsel,¹⁴ whether objections were sustained, and any corrective or related instructions given. See *Darden*, 477 U.S. at 182, 106 S.Ct. at 2472.

Collins I, 478 N.E.2d at 280.

[24, 25] Evidence that a witness is in protective custody may be relevant, but should be used cautiously. See *United States v. Adams*, 742 F.2d 927, 944-46 (6th Cir.1984), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985). Here, petitioners questioned Lyles about benefits she had received from the government. It was unnecessary and improper for the prosecution to expand on that by also eliciting information about being in protection. However, the prosecution did not dwell on the fact that Lyles and Nellum were provided with protection. The few references made did not rise to the level of a constitutional violation by so inflaming the jury that petitioners were deprived of a fair trial. The references to protective custody are not a basis for granting habeas corpus relief. Cf. *United States v. Caliendo*, 910 F.2d 429, 436 (7th Cir.1990); *United States v. Pansa*, 738 F.2d 278, 285 (8th Cir.1984); *United States v. Blankenship*, 707 F.2d 807, 810-11 (4th Cir.1983).

Certain impeachment of Beatrice Mack, an alibi witness for Collins, is also alleged to be their effect on the trial as a whole." *Darden*, 477 U.S. at 182, 106 S.Ct. at 2472.

3. During Presentation of Evidence

Petitioners complain that evidence as to Lyles and Nellum being relocated was elicited by the prosecution and also raised in the prosecution's closing argument. The Illinois Supreme Court held as follows on this issue:

... During cross-examination of Lyles the defense brought out the fact that Lyles had received money from the State's Attorney's office. On redirect examination by the State, Lyles testified that the money had been for security deposits and rent. There is nothing unfair about allowing the State to explain on redirect examination why it gave one of its witnesses money when that fact had been brought out by the defense during cross-examination. In closing argument, the defense referred to Lyles as being "well taken care of." On rebuttal the State asked, "why do you think we moved her? Do you think we were concerned about her [sic] responsibility to Laverne Lyles?" Again, there is no excuse for improper comments, but to determine

14. "[T]he idea of 'invited response' is used not to excuse improper comments, but to determine

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Nellum, Hooper, and "Jesse." The prosecution twice argued in closing that no prosecution witness had been questioned about Jesse. That was factually incorrect; Nellum had been questioned about Jesse. Objections were made to the argument and the court overruled the objections, but instructed the jury to rely on its recollection of the evidence. The prosecutor had also told the jury that his statements were not evidence. The jury was correctly instructed as to the law and had the opportunity to consider the prosecution's argument in light of the evidence presented at trial. Also, whether Nellum had been asked about Jesse was not a key fact, especially since he had denied having any knowledge of Jesse. The prosecution's misstatement of the evidence was not so prejudicial as to constitute constitutional error. Cf. *Donnelly*, 416 U.S. at 644, 94 S.Ct. at 1872; *United States v. Green*, 25 F.2d 395, 210 (3d Cir.1994); *Thurrien v. Vase*, 782 F.2d 1, 4 (1st Cir.), cert. denied, 478 U.S. 1162, 106 S.Ct. 2285, 90 L.Ed.2d 727 (1986); *Grordin v. Pyle*, 762 F.Supp. 979, 982-83 (D.Col.1990), *aff'd by unpublished order*, 966 F.2d 592 (10th Cir.), cert. denied, 502 U.S. 919, 112 S.Ct. 329, 116 L.Ed.2d 269 (1991). For similar reasons, the alleged mischaracterization of Lyles's testimony, see C7469, is not constitutional error.

Petitioners also complain of arguments made by the prosecution in closing. The following arguments were made in the prosecution's initial summation, argued by assistant State's Attorney Owen. Hyman and O'Callaghan were both assistant State's Attorneys who testified at the trial.

OWEN: You heard the evidence. You heard the rebuttal witnesses that we put on after they put on their cock and bull defense, that Bracy was with his sister.

4. Closing Arguments

[31] Collins complains that the prosecution made arguments as to Johnson that sought to link Collins to crimes committed by Bracy in Arizona. See C7443. It is unclear how the prosecution argument linked Collins to the Arizona crimes. In any event, this issue was never raised in the state courts and no argument in support of it is made in response to respondent's motion to dismiss. See C Reply 23-30. This issue is waived.

[32] It was part of petitioners' defense that the murders had been committed by

earring in your nose isn't that correct?"

Do you think Lawrence Hyman came in and lied for me and Goggin? Do you think O'Callaghan lied for us? Do you think an attorney would put his license on the line for the likes of these two, Collins and Bracy? There is no way. We go to school for too long for that, to get up and perjure ourselves for those two guys, or against those two guys.¹⁵

OWEN: The gun's in the lake; when Morris Nellum was on the witness stand he was cross-examined about the guns and he told you that he did in fact lie to the police. He said, "yes, I lied, I told the police I didn't know where the guns were." And you also heard that I interviewed Nellum a few hours later. Did you hear any questions about what Nellum told me about the guns? Did you hear anything about that at all? Did any lawyer for the defense ask that question? You see, I can't. That is improper for me, but they didn't because they didn't want to hear that.

McDONALD: Objection, Judge.

COURT: Overruled.

McDONALD: That is improper argument.

Tr. 1285, 1288-89.

In his closing argument, Collins's attorney argued that testimony of assistant State's Attorney Dorfman (who did not prosecute the case) was inconsistent with Dorfman's written report. The defense attorney stated: "But they want Collins so bad, so bad that they made a guy come in here and tell you something that he knows is not in that report." Tr. 1333. Assistant State's Attorney Michael Goggin responded in the prosecution's rebuttal.

counsel was made as to this issue. See Appellants' Postconviction Brief 18-19, 22-26. See also *Collins II*, 606 N.E.2d at 1143, 1144. Not having previously been presented to the state court, ineffective assistance of counsel cannot constitute cause. While this part of the prosecution's summation cannot directly be considered as a claim, it is part of the context of the other statements that must be considered in determining whether the other statements constitute grounds for granting relief. In the direct appeal, defendants argued that any question of Goggin's invited error must be considered in light of

GOGGIN: It is Mr. Owen and my duty to present the prosecution of this case. That is what we are paid to do. That is what we swore on oath to do when we were sworn in as assistant state's attorneys. It is the responsibility of Mr. Frazin to represent this killer and it is the responsibility of Mr. McDonald to represent this killer.

McDONALD: Objection.

COURT: Overruled.

GOGGIN: And for Mr. Frazin to stand before you just now and to accuse me of suborning perjury by bringing in Mr. Dorfman is disgusting. And if you think that I would jeopardize my license, my family, my children, my future, to put Mr. Dorfman on in a case and make him lie, well I say to you ladies and gentlemen, we had better leave this system, and we had better all start taking on other responsibility. That is what—

McDONALD: Objection, this is improper argument.

COURT: Overruled.

Tr. 1335-36.

[33] The following arguments were also made by Assistant State's Attorney Goggin in his rebuttal.

GOGGIN: You think about the fact that these two lawyers get up here and mimic and mock and demean you.

• • • • •

GOGGIN: Let's talk about something, how Mr. McDonald misrepresents to you what the law is. You will hear about reasonable doubt. You will hear about beyond a reasonable doubt, and you will be told that is what the burden of proof is. And let me tell you something. That is the same burden of proof in every case that is tried in this courtroom, every case that is tried in this country, and every case that is tried in this country. It is beyond a reasonable doubt. The penitentiary is full of people like Collins and Bracy who have been

Owen's statement in the initial summation. See Direct Appeal Reply 23.

17. Petitioners also contend that this statement constitutes grounds for relief because it misstates the government's burden of proof. States have leeway in defining what is meant by reasonable

proved guilty beyond a reasonable doubt, the Benny Weathers, the Derrick Phillips, the Roger Collins, the Murray Hoopers, and the Bill Bracys are convicted daily beyond a reasonable doubt. There is no mistake about that. Nothing at all." Tr. 1338, 1343.

Petitioners also point to additional statements made by the prosecution in its closing argument, but which were not raised as errors in the direct appeal to the Illinois Supreme Court. Therefore, by themselves, they cannot be grounds for granting relief. However, since prosecutorial misconduct must be evaluated in the context of the entire record, the additional statements are still relevant for evaluating the claimed errors that have not been waived.

OWEN: I mean, Morris Nellum got on the witness stand and said he was not the murderer, he told you that, and I'm the one, along with Eagen and Hyman who made the decision in this case, and we will live with this decision, and the decision was to use him as a witness against the killers, Cochiase, Bracy, and Hooper, who by the way will be tried by Goggin and myself.

• • • • •

OWEN: We have got the guns because we went out of our way, we went out of our way in this case because these two guys have to be taken off the street. We went out of our way and hired a professional diving service, and lo and behold they found the guns. Thank God they did.

• • • • •

GOGGIN: ... They asked you to think about the fact that Morris Nellum lied about where the guns were. And let me tell you something, ladies and gentlemen, they didn't ask about any other questions and answers in these 13 pages? They didn't do that, did they, ladies and gentlemen? Why didn't they do that? What do you think is contained in these 13 pages?

doubt. Even ignoring that this argument was not the definition of reasonable doubt contained in the jury instructions, this description of the reasonable doubt standard does not approach constitutional error. See *Victor v. Nebraska*, — U.S. —, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

and a personalized response thereto were first raised by the prosecution in its initial summation. However, no objection was made to this statement. Defense counsel then went further and implied the prosecuting attorneys had knowingly solicited perjured testimony from their colleagues. Goggin's comments in rebuttal were a direct response to the accusation made against him. Goggin's comments were unnecessary and improper, but were not so inflammatory and prejudicial as to deny petitioners a fair trial. The jury was not prevented from fairly considering the credibility of the witnesses.

The comment Owen made about the gun and his interview with Nellum was characterized by the Illinois Supreme Court as "one that would have been better left unsaid." *Collins I*, 478 N.E.2d at 284. The Illinois Supreme Court held that there was "but a fleeting reference to this subject" and held that the comment could not be held to be reversible error viewed in light of the other evidence. *Id.* This court agrees.

[37] In his rebuttal, Goggin refers to the 13-page statement of Nellum that was not before the jury and implies that this statement bolsters Nellum's credibility. At another point, Goggin argues about testimony at a voir dire outside the jury's presence, but the court upheld an objection to this argument. The prosecution made a number of statements putting forth the theory that it was the defense attorneys' duty to defend guilty killers and, consistent with their duty, they sought to lie to the jury and mock and demean the jury. The prosecution also made a number of statements that they would not be prosecuting the case or presenting certain evidence if they did not personally believe the defendants had committed the crime and Nellum was telling the truth.

None of these statements individually or taken together are so egregious or inflammatory as to constitute a due process violation. The jury was instructed that the attorneys' arguments were not evidence. The statements were not so extreme that it is likely the jury ignored this instruction. Moreover, the evidence in this case was so strong that it is not likely that the improper argument affected the outcome of the trial. The prose-

cution offered Nellum's eyewitness testimony. Although his credibility was questioned, there was substantial corroborating testimony. Other witnesses saw Collins at or near the apartment where the victims had been held. Nowell's testimony linked Bracy to one of the murder weapons. Further, the alibi evidence of both petitioners was weak due to the doubtful credibility of the alibi witnesses.

This is not a case like *Shaw*, 755 F.2d at 1281-85, where the prosecutor indicated that evidence not before the jury would show the defendant was guilty and jury questions indicated jury uncertainty about the defendants' guilt. This case is more like cases in which questioned remarks were held to be an insufficient basis for granting habeas corpus relief. Cf., e.g., *Gonzalez v. Sullivan*, 934 F.2d 419, 423-24 (2d Cir.1991); *Kennedy v. Dugger*, 983 F.2d 905, 914 (11th Cir.1991), cert. denied, — U.S. —, 112 S.Ct. 1518, 117 L.Ed.2d 654 (1992); *Brodley v. Meachum*, 918 F.2d 338, 343-44 (2d Cir.1990), cert. denied, 501 U.S. 1221, 111 S.Ct. 2835, 115 L.Ed.2d 1004 (1991); *Lundy v. Campbell*, 888 F.2d 467, 479-80 (6th Cir.1988), cert. denied, 495 U.S. 960, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); *Shepard v. Lane*, 818 F.2d 615, 622 (7th Cir.), cert. denied, 484 U.S. 929, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987). Petitioners are not entitled to relief based on the closing arguments of the prosecutors.

5. Sentencing Phase Arguments

[38] Petitioners also complain of prosecutorial misconduct during closing arguments of the sentencing phase. The same standard is applicable to both the guilt phase and the sentencing phase; the misconduct must so infect the sentencing proceeding with unfairness as to violate due process. See *Romano* — U.S. at —, 114 S.Ct. at 2012.

[39] During his closing statement, which was short, Bracy's attorney made an emotional argument in which he stated his opposition to the death penalty and made reference to the commandment "thou shalt not kill" as being a reason not to impose the death penalty. In rebuttal, assistant State's Attorney Owen began as follows:

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What names do you think are mentioned in these 13 pages, and this was taken three to four hours before Owen got to Area One, before Owen accepted his responsibility on that weekend and came to Area One and talked to Hooper and talked to Nellum and decided to offer Nellum a deal....

• • • • •

GOGGIN: Let's talk about apartment 206. Last Wednesday when you were in the back this man (indicating), this professional killer took the stand and when he took the stand he did not know that I had this photograph (indicating)—

FRAZIN: Objection.

GOGGIN: People's exhibit No. 27.

FRAZIN: Objection.

COURT: Overruled.

GOGGIN: He did not know that our evidence technician when they recovered these ropes took photographs of that apartment and he took this witness stand and he testified in this case, and he testified—

McDONALD: I vigorously object to him talking about testimony taken outside the presence of the jury.

COURT: Well, that will be sustained.

• • • • •

GOGGIN: What motive does Morris Nellum have? What reason does he have? What in his background is there that would make him come in and testify that Collins is a killer and that Bracy is a killer? What was there in his background that would make him lie about that, if he is lying? What did Collins do to him? What did Bracy do to him? What did Hooper do to him? Nothing. There is no reason for him to lie. What reason is there for O'Callaghan and Hoke and the whole bunch of people at Area One to stop investigating the case and let the real killers go? What reason is there for Owen and me to sit here and let the real killers stalk the streets. What reason? There is none. Tr. 1290, 1300, 1337, 1340-41, 1353.

[34] Reference to facts not in the record is improper. *United States ex rel. Shaw v. De Robertis*, 755 F.2d 1279, 1281 (7th Cir.

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OWEN: Are you going to follow your oath? Are you going to do what you raised your right hands and swore to do? Are you going to follow the law as it is going to be given to you by the judge—

McDONALD: This is improper—

OWEN: —and as you said you—

COURT: Overruled.

OWEN: Each and every one of you before you were accepted by both sides in this case was asked by the judge, "Could you in certain circumstances consider the imposition of the death penalty?" Every one of you twelve citizens said that you could and that you would.

You took an oath following that to follow the laws of the State of Illinois.

I'm not going to get up here and give you a sermon. I'm not going to preach. But I am going to comment on one thing that Mr. McDonald said. He said, "Thou shalt not kill."

I've heard that before. People in 1941 through 1945 killed in the name of their country—

McDONALD: Judge, I'm objecting to this argument—

COURT: Overruled.

OWEN: —in service to their country. Some of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment of the Bible.

McDONALD: Objection. This is entirely wrong—

COURT: Overruled.

OWEN: It is no more killing than what you ladies and gentlemen of the jury swore that you would do after we presented all of the evidence in this case.

To stand up here and tell you that if you in fact find that there are no mitigating factors, no mitigating circumstances sufficient enough to preclude the imposition of

18. Even if it were true, as petitioners contend, that the argument invoked a factor irrelevant to aggravation or mitigation, a recent Supreme Court case indicates that presentation of evidence irrelevant to the sentencing determination

[35] The prosecutor grouped together himself, the other prosecutor, and the two testifying assistants, implying they were a team of honest persons and thereby personally vouching for the credibility of the testifying assistants. On rebuttal, Goggin referred to his oath as an assistant State's Attorney and argued, "And if you think I would jeopardize my license, my family, my children, my future, to put Mr. Dorfman on in a case and make him lie," Defense objections were overruled. Just as relying on evidence outside the record can violate the Constitution, see *Shaw*, *supra*, vouching for the credibility of evidence involves some of the same problems in that the prosecutor's statements are not subject to cross-examination. See *United States v. Robinson*, 8 F.3d 398, 415 (7th Cir.1993); *United States v. Phillips*, 527 F.2d 1021, 1024 (7th Cir.1975). *Phillips* is a direct review case which indicates that the prohibition on arguing personal belief is "elemental and fundamental." *Id.* (quoting *Greenberg v. United States*, 290 F.2d 472, 475 (1st Cir.1960)). Other courts have recognized that a prosecutor's personal vouching for the credibility of evidence is a claim cognizable on federal habeas corpus review. See, e.g., *Floyd*, 907 F.2d at 354. However, the remarks being improper is not sufficient; relief will not be granted unless so inflammatory and prejudicial that the trial is unfair and unless the statements likely changed the outcome of the trial. See § 111(C)(2) *supra*.

[36] The Illinois Supreme Court held that the rebuttal argument about jeopardizing Goggin's license, etc. was invited error. See *Collins I*, 478 N.E.2d at 284. The Illinois Supreme Court ignored that arguments about challenges to the prosecutors' integrity

the death penalty, is a slap in every veteran's face.

McDONALD: Objection.

COURT: Overruled. He may argue, just as you argued.

Tr. 1644-46.

The Illinois Supreme Court held that the prosecution's argument was invited by defense counsel's argument. *Collins I*, 478 N.E.2d at 288. As was indicated by the Illinois Supreme Court, the prosecution's argument was a "bit dramatic." See *id.* However, the argument of Bracy's counsel was also a bit dramatic. Arguments about a jury's duty to follow law and presenting an analogy with fighting war were a response to defense counsel's reference to the Ten Commandments. Contrary to Bracy's argument, B Reply 32, the prosecution did not argue the jury should consider factors unrelated to mitigation or aggravation; it argued that the jury should follow the law which permits the imposition of the death penalty.¹⁸ The argument as to war did not so infect the sentencing proceeding with unfairness as to violate due process.

The remaining claims based on sentencing phase arguments, CIV 477-78, 490-94, are waived either because not objected to at trial, see *Collins I*, 190 Ill.Dec. at 66, 67, 478 N.E.2d at 283, or not raised on appeal and no claim of ineffective assistance of trial or appellate counsel has been adequately presented to the Illinois Supreme Court. See Appellants' Postconviction Brief 18-19, 22-26; *Collins II*, 606 N.E.2d at 1143, 1144. Having failed to adequately present claims of ineffective assistance of counsel to the state court, ineffective assistance of counsel cannot constitute cause for failing to present issues to the state court. See *Murray*, 477 U.S. at 488-89, 106 S.Ct. at 2645-46; *Morrison*, 898 F.2d at 1300.

For the foregoing reasons, none of the prosecutorial misconduct allegations state a basis for granting relief. Bracy Claims IV and XIV and Collins Claim III will be denied.

is not, standing alone, a basis for finding constitutional error; the evidence still must violate some constitutional prohibition. See *Romano*, — U.S. at —, 114 S.Ct. at 2011.

D. Sufficiency of Evidence (B13, C4, C20)

[40] It is contended that the evidence was insufficient to find petitioners guilty of murder¹⁹ and armed robbery. The convictions must be upheld if, viewing the evidence "in the light most favorable to the prosecution," any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.²⁰ *Kines v. Go-dinez*, 7 F.3d 674, 677 (7th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 1314, 127 L.Ed.2d 664 (1994) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). The entire transcript of the trial has been considered.²¹ The Illinois Supreme Court's summary of the evidence that is quoted in § 1 *supra* is accurate and binding on this court.

1. Murder

[41] Petitioners argue that Nellum's testimony was essential to the State's case. They do not dispute that his testimony alone could be sufficient to uphold the conviction. "The testimony of one eyewitness, even if he is a member of the criminal class and has no intrinsic credibility, is enough to convict in the absence of contrary evidence, or of [grave] contradictions." *United States v. Velasquez*, 772 F.2d 1348, 1352 (7th Cir.1985), cert. denied, 475 U.S. 1021, 106 S.Ct. 1211, 89 L.Ed.2d 323 (1986). Nellum did not testify that he saw the actual shootings, but he was with the petitioners when they took the victims to where their bodies were found and participated in the disposition of murder weapons. Petitioners argue that all of Nellum's testimony could have been suggested by the police. That credibility question, however, was for the jury. The alleged deficiencies and contradictions in Nellum's testimony

19. The insufficiency of evidence of murder claim is not expressly raised by Bracy. Collins's argument, however, is being considered as to both petitioners.

20. Information outside the record is not to be considered in determining the sufficiency of evidence. It will only be considered as the basis of some other independent claim, e.g., the recantation claim, see § 111(B) *supra*, or the Brady claim, see § 111(F) *infra*.

21. Felony murder was one of four options for supporting the second element of the murder

were not so great as to make his testimony unbelievable to any rational trier of fact. His testimony was highly corroborated by weapons and physical evidence. Independent witnesses placed both Collins and Bracy in the presence of the victims. Also, an independent witness heard the shots fired. While this testimony was also subject to impeachment, it was again a question of credibility for the jury. Petitioners' alibi testimony was not convincing. The jury's finding of guilt is amply supported by the evidence.

2. Armed Robbery

[42] Petitioners also claim that the evidence was insufficient to support the armed robbery conviction. Assuming the merits of that claim, it is also claimed that the death sentence on the murder charges must be vacated because the armed robbery convictions were considered as aggravating factors.²²

[43] The jury was instructed that the following elements of armed robbery had to be proven: "One, that the defendants, or one for whose conduct each is responsible, took money from the person or presence of Frederick Laezy, R.C. Pettigrew, or Richard Holliman; and two, that the defendants, or one for whose conduct each is responsible did so by the use of force or by threatening the imminent use of force; and three, that the defendants, or one for whose conduct each is responsible, was armed with a dangerous weapon." Tr. 1372 (People's Instruction 21, I.P.1.Crim. 14.02).

The following testimony of Nellum is relied upon as being the evidence supporting that

instruction. See Tr. 1366 (People's Instruction 16, I.P.1.Crim. 7.02). Since the aggravated kidnapping conviction also supported felony murder, vacating the armed robbery conviction clearly would not require vacating the murder conviction. Even if aggravated kidnapping were not an alternative, evidence of one or more of the three other alternatives for satisfying the second element would make vacating the armed robbery conviction harmless error as to proof of the second element of murder.

A. You could say that.

Tr. 538-39, 542, 543-44.

On cross-examination by Bracy's attorney, Nellum testified as follows:

Q. Now, you told us, meaning the Court and jury that you were given a hundred twenty-five dollars by Bracy?

A. Yes.

Q. Where were you given this money?

A. In the parking lot.

Q. Before you took the guns and dumped them in the lake, is that right?

A. Right.

[Q. You recall being asked this question by the police.

"Q. Now there was an amount of money taken after these guys were all shot. Do you know how much money was taken?"

A. They told me eighteen hundred."

Was that asked of you and did you answer?

A. It was asked.

Q. Did you make that answer?

A. Yes.

Q. "Now there was an amount of money taken after these guys were all shot. Do you know how much money about was taken?"

That's exactly what's done here. Do you remember that question?

A. Right. Well, I, you know, like I said, I mean I told them what it was, what I thought.

Q. Well, did you see somebody going through the dead bodies for money, is that what you're telling us?

A. No.

Q. Did you see anyone take money from these people at any time?

A. No. I was told by Hooper how much money was taken.

Q. That's your old friend Hooper. When did he tell you that?

A. Well, it was later, after, you know, I had dropped him off at home, all this. He's always around. He and I talk a lot.

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money was taken from one of the murder victims.²³ See CR 58-59.

On direct examination, Nellum testified as follows:

Q. Where was Bracy?

A. He was standing by the car too.

Q. Did you have any conversation with Bracy or did Bracy have a conversation with you at that time?

A. Well, he gave me a hundred twenty-five dollars.

Q. Who gave you a hundred twenty-five dollars?

A. Bracy.

Q. What did he say, if anything, when he gave you a hundred twenty-five dollars?

A. He just said "Here's a little something for you." And "Just be cool."

Tr. 514.

On cross-examination by Collins's attorney, Nellum testified as follows:

Q. Now, this deal that was going on in apartment 206 in the evening of November 12th, was it a robbery or something taking place?

A. I imagine so.

Q. Well, did you hear a conversation concerning a robbery, Mr. Witness?

A. No. It was all set up when I got there.

Q. You mean the deal to take these guys down, so to speak was already set up, right?

A. Yes.

Q. You knew you were going along with it, right?

A. Yes.

Q. For a piece of the action, right?

A. Yes.

Q. You were going along with the armed robbery, right?

A. I didn't know what they were doing.

Q. Well, you saw them being tied up, right?

A. I saw they were tied up after I got there.

22. The bracketed portion of the testimony is hearsay that was challenged on direct appeal.

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to litigate the issue. *Stone v. Powell*, 428 U.S. 466, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

[45] Collins argues that Judge Maloney was a corrupt judge who took bribes from defendants, but who automatically ruled in favor of the state if no bribe was being paid by the defendant. In accordance with this argument, Collins contends that he did not have a full and fair opportunity to litigate his motion to suppress. Proof of a biased tribunal would be a basis for this court considering Collins's Fourth Amendment claim. See *United States ex rel. Conroy v. Bombard*, 426 F.Supp. 97, 109 (S.D.N.Y.1976) (citing *Bator, Finality in Criminal Law & Federal Habeas Corpus Review for State Prisoners* 76 Harv. L.Rev. 441, 456 n. 26 (1963)). The Judge Maloney corruption claim is considered in § 111(L) *infra*, where it is held to lack merit. Therefore, there is also no basis for considering the Fourth Amendment claim. Collins Claim V will be denied.

F. A Judge's Wife on Jury—Discovery and a Hearing (B3, B17, C6-8)

One of the jurors in this case was Dorothy Downing ("Downing"), the wife of former Cook County Circuit Court judge and Illinois Appellate Court justice, Robert Downing ("Judge Downing"). In 1970, Judge Downing sentenced Bracy to 12 to 36 years in prison for an armed robbery conviction committed before he was apprehended. During voir dire, Downing stated that her husband being a judge would not cause her to favor one side or the other and that she could be impartial.

No party objected to Downing serving on the jury. During the trial, anticipating impeachment of Bracy, Bracy's counsel brought out Bracy's three prior armed robbery convictions in 1965, 1970, and 1975 on Bracy's direct examination. In questioning Bracy about the pertinent armed robbery conviction, Bracy's counsel mentioned Judge Downing's name together with the names of two other sentencing judges and the length of the terms imposed, 8-20, 12-36, and 6 years. Mr. Downing and the other jurors heard that Judge Downing sentenced Bracy in the

Collins complains that revealing that Judge Downing sentenced Bracy, was prejudicial to him as well. Collins revealed, on direct examination by his attorney, that he was convicted of six armed robberies in 1966 and given 4-10 and 16 year sentences and convicted of four armed robberies in 1974 when he received a 10 year and a 10 year and a day sentence. Collins was released on parole in May 1980.

Since no objections to Downing's selection for the jury were raised, the Illinois Supreme Court held that objections to her selection were waived. *Collins I*, 478 N.E.2d at 282. See also *Collins II*, 180 Ill.Dec. at 63, 606 N.E.2d at 1140. However, on direct appeal, the Illinois Supreme Court also considered whether it was ineffective assistance of counsel to permit Downing to serve on the jury and to present evidence that her husband had previously sentenced Bracy. The Illinois Supreme Court held that the record did not show that permitting Downing on the jury was unreasonable and therefore failure to object to her selection could not constitute ineffective assistance of counsel. *Collins I*, 478 N.E.2d at 283. It also held that bringing out Judge Downing's name was an error of judgment on the part of defense counsel, but that it did not support an ineffective assistance of counsel claim because there was not a reasonable probability that the error affected the outcome of the trial. *Id.* See also *Collins II*, 180 Ill.Dec. at 64, 606 N.E.2d at 1141.

In his brief, Bracy does not contend that it was error to initially allow Downing to sit on the jury. However, he contends that, once it was revealed Judge Downing had previously sentenced Bracy, it was error to permit the trial to continue with Downing on the jury. See B Reply 9-11. Respondents contend this issue is waived, but Bracy argues that the Illinois Supreme Court never made a clear statement that it was waived. See *id.* Alternatively, Bracy argues trial counsel provided ineffective assistance of counsel. *Id.* at 14-16. Apparently adopting Bracy's argument as to the merits, the focus of Collins's argu-

ment is on waiver and the question of whether the state provided adequate opportunity to prove that petitioners were prejudiced by Downing sitting on the jury. Collins argues that postconviction counsel should have been provided funds to hire an investigator and the opportunity to investigate whether having Downing on the jury and bringing out the Judge Downing sentencing had an effect on the outcome of the trial. See C Reply 39-40.

On direct appeal, petitioners made the argument that Bracy primarily advances. See Direct Appeal Appellants' Brief 66-68. They argued that the constitutional right to a fair trial, including the right to an impartial tribunal, was violated by permitting Downing to sit on the jury after evidence came out that Judge Downing had previously sentenced Bracy. It was also argued that the attorneys provided ineffective assistance of counsel. *Id.* at 68. The state argued that no objection was raised during the trial and that petitioners motion for a new trial did not allege any prejudice as a result of Downing's service. See Direct Appeal Appellee's Brief 74.

The Illinois Supreme Court held as follows on this issue:

Defendants next argue they were denied a fair trial because one of the jurors was the wife of a judge who previously sentenced Bracy to prison. During voir dire it was learned that Dorothy Downing was the wife of Justice Robert Downing of the Illinois Appellate Court and that Justice Downing had previously served as a criminal court judge in the circuit court of Cook County. Mrs. Downing stated, however, that although her husband was a judge, it would not cause her to favor one side or the other, and she assured the court that she could be impartial. The record reveals that defense counsel possessed Bracy's conviction record which showed that in 1970 Judge Downing sentenced Bracy to 12 to 36 years in prison for armed robbery. Despite this fact, no objection was raised to Mrs. Downing being sworn in as a member of the jury, nor was any allegation of prejudice asserted in defendants' written motion for a new trial. The failure to challenge a juror for cause or by preemptory challenge waives any objection to that

juror. [Citation omitted.] Here the jury was duly accepted by the defendants; they cannot now be heard to complain that they were denied a fair trial.

Collins I, 478 N.E.2d at 282.

On postconviction appeal, petitioners argued that they were deprived of a fair and impartial jury by Downing's presence on the jury. See Postconviction Appellants' Brief 14-16. Although not as specific as the direct appeal brief, in the postconviction appeal petitioners were at least arguing in part the effect of the Judge Downing sentence on the jury in light of Downing's presence on the jury. On the postconviction appeal, the Illinois Supreme Court held:

The defendants first argue that they were deprived of a fair trial and an impartial jury by the presence on the jury of the wife of an appellate court judge who had sentenced one of the defendants in an earlier conviction when the judge was sitting on the circuit court.

During voir dire, one of the venirepersons, Dorothy Downing, stated that she was the wife of an Illinois appellate judge sitting in the first district. She also stated that her husband had formerly been a judge on the circuit court of Cook County. When questioned by the trial judge in this matter, Downing stated that the fact that her husband was an appellate judge would have no effect upon her consideration of the defendants' case and that she could be fair and impartial. She was accepted by both counsel as a juror.

No objection was raised to Downing's presence on the jury during trial. However, on direct appeal to this court, the defendants argued her presence on the jury was *per se* prejudicial, requiring that their convictions be set aside. This court concluded that the defendants had waived the issue for purposes of review.

When a defendant has previously taken a direct appeal, all matters which were raised or which could have been raised on that direct appeal are *res judicata* in his subsequent post-conviction proceeding. . . . Although a dissent filed in *Collins I* made essentially the same argument that the defendants are now presenting to this

even if the reasonable probability standard is satisfied, the prejudice component is not fully satisfied unless "the result of the proceeding was fundamentally unfair or 'unreliable.'" *Lockhart*, — U.S. at —, 113 S.Ct. at 842. A result will not be fundamentally unfair or unreliable unless the petitioner was "deprived of any substantive or procedural right to which the law entitles him." *Id.*, 113 S.Ct. at 844. See also *Durrie v. United States*, 4 F.3d 548, 551 (7th Cir.1993); *United States v. Springs*, 988 F.2d 746, 749 (7th Cir.1993).

Since allowing Downing to continue on the jury after her husband's prior relationship with Bracy was revealed is more serious than initially permitting her to be on the jury, only the former need be considered. There is no dispute that, as was held by the Illinois Supreme Court, *Collins I*, 478 N.E.2d at 283, the performance of counsel was "an error in judgment." Collins's attorney failed to object to introduction of that evidence. The Illinois Supreme Court held the error did not rise to the level of ineffective assistance of counsel because it held the prejudice component was not satisfied.

The right to a fair and impartial jury is guaranteed by the Sixth Amendment. *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992). The question of Downing's alleged impartiality, therefore, implicates a fundamental right. If a reasonable probability of bias affecting the outcome of the trial can be shown, the fundamental fairness aspect of the prejudice component would be satisfied since the fundamental right to an impartial jury would have been denied.

[51-53] Whether a particular juror was biased generally is a factual question. *Hunley*, 975 F.2d at 318. On habeas review, this court must defer to factual determinations of the state court unless one of the exceptions listed in 28 U.S.C. § 2254(d) is satisfied. *Id.* This, however, does not preclude application of a conclusive presumption of bias where appropriate. *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 223, 102 S.Ct. 940, 949, 71 L.Ed.2d 78 (1982)). Whether a juror's partiality may be conclusively presumed from the circumstances is a question of federal law on which this court does not defer to the Illinois courts. *Hunley*, 975 F.2d at 318-19.

[54] Bias will only be presumed in extreme and exceptional circumstances. *Hunley*, 975 F.2d at 319. "Courts have been inclined to presume bias in 'extreme' situations where the prospective juror is connected to the litigation at issue in such a way that is highly unlikely that he or she could act impartially during deliberations." *Id.* The connection may be through a close relative. See *Smith v. Phillips*, 455 U.S. at 222, 102 S.Ct. at 948; *Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir.1990), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1059 (1991).

[55] No case has been found involving a connection to a judge who had presided over a prior criminal case against a defendant. In one case, the wife of the judge trying the case sat on the jury for that case. Neither the prosecution nor the defendant objected to her being on the jury and there was no evidence of actual bias or effect. The appellate court, however, held that the fundamental right to an impartial jury was violated and that actual prejudice need not be shown. *People v. Horton*, 160 A.D.2d 1046, 553 N.Y.S.2d 537, 538-39 (1990). This holding relied in part on the interests of the "public at large" in an impartial judicial system, not just the defendant's individual right to an impartial trial. Other cases involving relatives of jurors include the following: *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir.1980) (convictions reversed on ground that one of the jurors, in response to a direct question asked during voir dire, had failed to reveal that he had a brother, sister-in-law, and nephew who had been convicted of criminal offenses); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979) (court presumed that juror whose sons were currently imprisoned for heroin-related crimes could not remain impartial during heroin conspiracy trial); *United States v. Caldwell*, 543 F.2d 1333, 1347 (D.C.Cir.1974), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (no presumption of bias because related to police officer); *Brown v. United States*, 356 F.2d 230, 233 (10th Cir.1966) (prejudice could not be presumed by fact that juror in murder trial had a brother who had been murdered); *Scott v. Bell*, 586 So.2d 848, 851 (Miss.1992)

court (see *Collins*, 106 Ill.2d at 289, 87 Ill.Dec. 910, 478 N.E.2d 267 (Clark, C.J., dissenting, joined by Simon, J.)), we recognize that the majority found the question of Downing's presence on the jury to have been waived by the defendants. Therefore, the issue is *res judicata*.

Collins II, 180 Ill.Dec. at 63, 606 N.E.2d at 1140.

[46] Petitioners presented on direct appeal the issue of permitting Downing to continue on the jury after her husband's role in Bracy's prior conviction had been revealed. This issue was fairly presented as a constitutional claim. Fairly presenting a claim on direct appeal will exhaust a claim and preserve it for federal habeas corpus relief even if the state court fails to expressly address the issue in its opinion. *Smith v. Dignon*, 434 U.S. 332, 333-34, 98 S.Ct. 597, 598-99, 54 L.Ed.2d 582 (1978). On direct appeal, the Illinois Supreme Court considered the issue in terms of allowing Downing to be selected for the jury. See *Collins I*, 478 N.E.2d at 282. Waiver of the continued presence on the jury issue is implied by the facts that (1) there was also no objection raised at the time the Judge Downing sentence was revealed by defense counsel; (2) the state argued that such waiver had occurred; (3) the opinion refers to the lack of "any allegation of prejudice asserted in defendants' written motion for a new trial"; *id.*; (4) the dissent reached the issue, *id.*, 478 N.E.2d at 290; and (5) the only aspect of this claim addressed on its merits by the majority is the alleged ineffective assistance of counsel, which does expressly consider Mrs. Downing's continued presence on the jury, see *id.*, 478 N.E.2d at 283.

[47] Petitioners seek to invoke the presumption of *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). However, that presumption only applies if the state court addresses the merits of the federal claim, while failing to clearly express reliance on a state default. See *Yat v. Nannemaker*,

23 On the direct appeal, it is indicated that petitioners failed to adequately allege prejudice to support their ineffective assistance of counsel claim. See *Collins I*, 478 N.E.2d at 283. However, the Illinois Supreme Court addressed the merits of the claim without clearly relying on a

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court (see *Collins*, 106 Ill.2d at 289, 87 Ill.Dec. 910, 478 N.E.2d 267 (Clark, C.J., dissenting, joined by Simon, J.)), we recognize that the majority found the question of Downing's presence on the jury to have been waived by the defendants. Therefore, the issue is *res judicata*.

Collins II, 180 Ill.Dec. at 63, 606 N.E.2d at 1140.

clear the presence on the jury issue was waived for failure to adequately present it to the trial court. Therefore, the continuing presence on the jury issue was defaulted due to failure to object at the time the Judge Downing sentencing evidence was introduced and by failing to adequately present the issue on the motion for a new trial. Thus, the issues regarding Downing's presence on the jury are only preserved as ineffective assistance of counsel claims.²³

[48-50] In order to succeed on an ineffective assistance of counsel claim, it must be shown both that the attorney's performance was deficient and that the deficiency prejudiced the petitioner. *Lockhart v. Fretwell*, — U.S. —, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993); *Cuppitt v. Duckworth*, 8 F.3d 1132, 1135 (7th Cir.1993) (en banc), *cert. denied*, — U.S. —, 114 S.Ct. 1226, 127 L.Ed.2d 571 (1994); *Patel v. United States*, 19 F.3d 1231, 1235 (7th Cir.1994). It is presumed that counsel performed competently and this presumption can only be overcome by "specific acts or omissions that fell outside the wide range of professionally competent assistance." *Patel*, 19 F.3d at 1235. The prejudice component requires satisfaction of two standards. First, the petitioner must have been prejudiced in the causal sense; there being a sufficient probability that the error affected the outcome. There must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cuppitt*, 8 F.3d at 1136 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)). Second,

procedural default. See *id.* Therefore, the *Harris* presumption applies and the Downing ineffective assistance of counsel claims are not procedurally defaulted. Respondents do not contend otherwise. See CR 63-66.

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one's own husband *and* had presided in one such proceeding does not turn such evidence into evidence that is highly unlikely to permit the juror to remain impartial.

Although, in retrospect, mentioning the name of Judge Downing in connection with one of Bracy's armed robbery sentences was seen to be an error, when that fact is considered together with all other evidence and the other convictions and records of the defendant, its significance pales and was not such as to constitute good cause for discovery and hearing on the effect of such information on the deliberations of the jury.

This court is bound by the factual findings of the Supreme Court of Illinois which are supported by the record. 28 U.S.C. § 2254(d). That court carefully considered the possible impact of the identification of Judge Downing and concluded that what it described as an "error of judgment" was not ineffective assistance of counsel. *Collins I*, 478 N.E.2d at 283. This court agrees. Accordingly, discovery and an evidentiary hearing with respect to this matter is not appropriate.

Bracy Claims III and XVII and Collins Claims VI, VII, and VIII will be denied. G. Ineffective Assistance of Counsel (B9, B16, C9-12, C27)

Ineffective assistance of counsel is claimed at all stages of the case: pretrial, guilt phase, sentencing phase, on appeal, and postconviction proceedings. Generally, these claims have been addressed in discussing the merits of the underlying error. To the extent they are not expressly discussed, it is because the underlying action was directly addressed and therefore ineffective assistance of counsel in permitting the error to occur need not be separately addressed. Any other ineffective assistance of counsel claims that are not expressly discussed have been waived because never presented to the Illinois courts.

There is no right to counsel in postconviction proceedings and therefore there can be no ineffective assistance of postconviction counsel claim that is cognizable in federal habeas corpus proceedings and the deficiencies of postconviction counsel cannot constitute cause for failure to present other inef-

in civil case, it was not abuse of discretion to refuse to excuse for cause a woman whose son had once been treated by the defendant doctor accused of malpractice); *Herman v. State*, 396 So.2d 222, 227 (Fla.App.), *cert. dismissed*, 402 So.2d 610 (Fla.1981) (bias of grand juror would not be presumed based on fact she was married to head of detective bureau that investigated charged crime). See also *Smith v. Phillips*, 455 U.S. at 222, 102 S.Ct. at 948 (O'Connor, J., concurring) (example of "an extreme situation that would justify a finding of implied bias . . . might include . . . that the juror is a close relative of one of the participants in the trial or the criminal transaction").

There was no dispute in this case that Bracy had been convicted of armed robbery and previously sentenced on that conviction. Indeed, each defendant had an extensive criminal record. Each defendant brought his criminal record before the jury. There was also no question raised as to the fairness of that prior sentence nor any evidence introduced as to possible sentences that could have been imposed for that conviction. Petitioners contend that Downing can be presumed to have recognized that this was a stiff sentence for armed robbery and therefore would have recognized that her husband had previously determined that Bracy was a bad person deserving of heavy punishment. It is contended that it is highly unlikely that Downing would have been able to put those thoughts aside and fairly evaluate the questions of guilt and punishment. It is also contended that, knowing she was the wife of a judge who had previously sentenced one of the defendants, other jurors may have deferred to her views.

It cannot be held as a matter of law that Downing's knowledge that her husband had previously sentenced Bracy to a lengthy term was highly likely to have influenced her decision. She had no knowledge of the armed robbery case other than the length of sentence imposed. In the case before her, she had lengthy testimony from which to decide the merits. There is no contention that knowledge of prior convictions and sentences thereon are themselves unduly prejudicial in this case. The additional knowledge that

fective assistance of counsel claims to the Illinois courts. *Coleman*, 501 U.S. at 762-57, 111 S.Ct. at 2566-68; *Jenkins*, 8 F.2d at 508; *Williams v. Chrna*, 945 F.2d at 932-33; *Bonin*, 999 F.2d at 429.

H. Death Qualified Jurors (B1, C13, C14) [56] Petitioners complain that the jury was conviction prone because venirepersons who stated they could not impose the death penalty were excluded from the jury. That claim is without merit; such a person may properly be excluded from the jury. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Witherspoon v. State of Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[57] Petitioners also complain that a particular venireperson was excused for cause on the ground that he could not impose the death penalty. Petitioners contend that the record does not adequately support this venireperson being excused.

After equivocating as to whether he could impose the death penalty, the venireperson's questioning finished with the following questions and answers.

Q. [Court] It might be difficult for everybody, but the question is can you do it?

A. I don't know, Your Honor.

Q. Well, we'll have to know whether you can consider it or you would not consider it under any circumstances.

A. Well, I would weigh the circumstances, if that's what you mean. I'd consider it in terms of the evidence.

Q. Well, yes. Certainly. I mean would you consider it?

A. Well, let me put it this way. Again, I'm not one who is in favor of capital punishment.

Q. You don't have to be. If you would consider imposing it, if the circumstances warranted it in the view of you and all the other jurors.

A. Well, if I'm not in favor of capital punishment, I don't see how I could very well, in any circumstances feel comfortable about considering it.

Q. Then, are you saying you could not consider it?

A. That's probably true.

Q. Then you're excused for cause. Tr. 265-66.

[58] In a capital case, a juror may be excluded for cause if his or her "views would prevent or substantially impair" the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424, 105 S.Ct. at 852 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)). There is no requirement that a juror's bias be shown with "unmistakable clarity." *Id.*, 469 U.S. at 424-26, 105 S.Ct. at 852-54. As the Supreme Court noted, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may wish to hide their true feelings." *Id.*, 469 U.S. at 424-25, 105 S.Ct. at 852-53. Additionally, factual findings as to a juror's ability to follow instructions in light of his or her views on capital punishment are findings of fact to which deference is owed pursuant to 28 U.S.C. § 2254(d). *Id.* at 429, 105 S.Ct. at 854.

Here the venireperson was carefully questioned. See Tr. 263-66. His responses were equivocal and indicated his doubts as to whether he could participate in deciding a capital case. In the end, he answered that it was "probably true" that he could not consider it. The record supports the state court finding that the venireperson was not capable of applying the death penalty. See *Collins I*, 478 N.E.2d at 286.

Bracy Claim I and Collins Claims XIII and XIV will be denied.

I. Denial of Continuance for Sentencing Hearing (B11, C16)

The jury returned verdicts of guilty on the evening of July 29, 1981. Petitioners requested a one-day continuance before the sentencing phase began. That motion was denied and a hearing was set for the afternoon of July 30. On July 30, petitioners moved for a two-week continuance. That motion was denied and a hearing was held at which petitioners were found eligible for the

evidence that he would have presented had he been granted a continuance.

[63] If the record could have been developed for the direct appeal, then Bracy can only succeed on his claim if he can show cause and prejudice for failing to develop the record on direct appeal. *Kenney*. — U.S. at —, 112 S.Ct. at 1721. Such cause and prejudice could be the ineffective assistance of trial and/or appellate counsel. However, to rely on such cause, that ineffective assistance of counsel claim must have first been fairly presented to the state court. *Murray*, 477 U.S. at 488-89, 106 S.Ct. at 2645-46; *Morrison*, 898 F.2d at 1300. No such claim, however, was fairly presented in the postconviction petition. Therefore, such a claim has not been preserved for use as cause in the present proceeding.

[64] Alternatively, if success on the denial of a continuance claim required the presentation of evidence outside the record, failure to adequately present it on direct appeal would not be a waiver. However, to preserve the claim for federal habeas corpus proceedings, it would have to be presented in the postconviction petition. This claim, however, was not made in the postconviction petition, nor were the facts supporting prejudice alleged in that petition.

[65] Even if Bracy's denial of a continuance claim has not been waived, it would fail on its merits. The record supports the Illinois Supreme Court's finding that counsel should have been aware prior to trial that this case would involve the death penalty. Prior to trial, counsel had the opportunity to speak to Bracy and his family to develop this evidence. There was no need for a continuance in order to have had an opportunity to present this evidence. *Cf. Smith v. Lane*, 794 F.2d at 292. Also, at least some of this evidence could have been prepared between the time the jury began deliberations on the merits and the time that the second phase of the sentencing hearing began. Furthermore, the trial judge was not informed that counsel wanted to develop this type of evidence. It

v. Woods, 995 F.2d 713, 716 (7th Cir.1993) (all the circumstances, including counsel's performance at trial are to be considered).

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death penalty. The second phase of the death penalty hearing was conducted on July 31. Prosecution witnesses were cross-examined, but no witnesses were presented by either petitioner.

On direct appeal, the Illinois Supreme Court found that petitioners should have been aware prior to trial that the state might seek the death penalty if defendants were convicted. See *Collins I*, 478 N.E.2d at 287. The court also pointed out that, on appeal, petitioners failed to point to any additional evidence that would have been introduced had a continuance been granted. *Id.* In light of these facts, it was held that the trial judge did not abuse his discretion by denying a continuance. *Id.* Bracy also complained that he was not informed until after the trial had begun that evidence of a multiple murder he allegedly committed in Arizona would be used by the state during the sentencing phase. As of the time of his Illinois trial, the Arizona charges were pending, but had not been tried. During the pendency of the Illinois direct appeal, the Arizona charges were tried and Bracy was convicted. On appeal, the Illinois Supreme Court held no prejudice could be shown because, had it reversed on this ground, at the new sentencing hearing the Arizona conviction could be introduced which would be even more conclusive evidence of Bracy's commission of the Arizona murders. *Id.* at 286-87. In the postconviction proceeding, petitioners made the related argument that counsel provided ineffective assistance of counsel by failing to present mitigating evidence. That claim was denied on the ground that petitioners did not point to any mitigating evidence that would have been presented had counsel performed adequately. *Collins II*, 180 Ill.Dec. at 65, 606 N.E.2d at 1142.

[59] In his federal habeas corpus petition, Collins still fails to point to any mitigating evidence that he would have presented had a continuance been granted or had his counsel been effective. Therefore, his claims must fail for failure to allege any prejudice resulting from the denial of the continuance or from any ineffective assistance of counsel.

24. The Eleventh Circuit has held that the question of whether the trial court abused its discretion is to be determined on the basis of the

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was not an abuse of discretion to deny a continuance to develop this information.

Counsel was not informed of the nature of the Arizona charges until the Illinois trial had begun. However, the Illinois Supreme Court notes that Arizona witnesses were listed on a discovery response provided by the prosecution ahead of the trial. The Illinois Supreme Court focused on the prejudice component and held that it was not satisfied because any retrial would permit the introduction of even more damaging evidence, Bracy's actual conviction on the Arizona charges. See *Collins I*, 478 N.E.2d at 286. Bracy argues that the subsequent conviction is irrelevant to whether his trial, that occurred prior to this conviction, was fundamentally unfair. Alternatively, he contends that he still could have attempted to overcome this evidence with the substantial alibi evidence available to show he was in Chicago when the Arizona murders occurred. The subsequent conviction is relevant to determining whether defendant suffered actual prejudice. That a jury has found beyond a reasonable doubt that Bracy committed the Arizona murders supports that it is unlikely that he would have been able to convince the sentencing jury that his participation in those murders had not been proven. Bracy cannot satisfy the actual prejudice component of the denial of continuance claim.

[66, 67] Bracy still has the related claim of ineffective assistance of trial counsel in failing to present the mitigation evidence. That claim, which was raised in the postconviction proceedings, was denied on the ground that plaintiff failed to adequately demonstrate that any such evidence existed. *Collins II*, 180 Ill.Dec. at 65, 606 N.E.2d at 1142. Having failed to adequately present the facts to the state court, that claim is

25. Also, as to the Arizona murder evidence, the prejudice component of ineffective assistance of counsel would not be satisfied just as the actual prejudice standard for the denial of continuance claim would not be satisfied.

26. In Claim XVI, Collins contends that the instructions as to burden of proof on aggravating and mitigating factors is unconstitutional. Respondent does not contend this claim is waived, instead treating it as a contention that the statute is unconstitutional because it lacks such a re-

Bracy, however, now points to mitigation evidence that he could have presented. He points to alibi witnesses and other exculpatory evidence presented at the Arizona trial. He also points to relatives of Bracy who could have testified to Bracy's difficult childhood and who could have also testified to their love for him and his value as a person. It is also claimed that prison personnel would testify to his model behavior while incarcerated. Bracy's claim requires further discussion.

[60, 61] The Seventh Circuit has indicated that denial of a continuance could possibly support a due process claim that would be grounds for granting habeas relief. *Bell*, 861 F.2d at 170 ("In some circumstances such a ruling [denying a continuance to prepare for a witness] could be a denial of due process: if the witness was crucial to the prosecution and the defense needed time to develop evidence to counter his testimony."). Other circuits have discussed the issue in greater detail. In order to succeed on a habeas claim based on denial of a continuance, the petitioner must satisfy the ordinary abuse of discretion standard that would apply on direct review and the denial of the continuance must also have rendered the proceeding fundamentally unfair. *Manlowe v. Toney*, 981 F.2d 473, 476 (10th Cir.1992); *Conner v. House*, 842 F.2d 279, 283 (11th Cir.), cert. denied, 498 U.S. 840, 864, 109 S.Ct. 107, 164, 102 L.Ed.2d 82, 135 (1988); *Hicks v. Wainwright*, 633 F.2d 1146, 1148 (5th Cir.1981). This analysis must be conducted in light of the need for a continuance and any actual prejudice resulting from the denial of the continuance. *Manlowe*, 981 F.2d at 476. Also, resolution of this issue is a mixed question of law and fact; deference is owed to any state court findings of fact. *Manlowe*, 981 F.2d at 476.

record before the court as of the time the continuance was denied. *Conner*, 842 F.2d at 283. Seventh Circuit law may allow facts occurring

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waived for federal habeas corpus purposes unless cause and prejudice is shown. *Kenney*, — U.S. at —, 112 S.Ct. at 1721. Postconviction counsel's ineffectiveness cannot constitute cause. *Coleman*, 501 U.S. at 752-57, 111 S.Ct. at 2566-68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrna*, 945 F.2d at 932-33; *Bonin*, 999 F.2d at 429. Bracy also argues that the state's failure to provide adequate investigatory resources to the pro bono counsel representing Bracy in the postconviction proceedings constitutes cause. Just as there is no constitutional obligation to provide postconviction counsel, there is no constitutional obligation to provide such counsel with adequate investigative resources. Additionally, postconviction counsel would have had ready access to Bracy and his relatives. Presumably, he also could have obtained a transcript of the Arizona trial which would have revealed the mitigation evidence that Bracy presently relies upon. Since not adequately presented to the Illinois courts, this ineffective assistance of counsel claim is waived.

For these reasons, Bracy Claim XI and Collins Claim XV will be denied.

J. Death Penalty Instructions (B16, C16-17)

Petitioners claim that the sentencing phase instructions were deficient. However, no claim of error in the instructions was raised on direct appeal and no claim of ineffective assistance of counsel in failing to present such a claim was made in the postconviction petition. Therefore, the claims based on the jury instructions are waived.

[68] One of the jury instruction claims is that the instructions are inadequate to guide the jury, with 1990 and 1992 studies by Professor Hans Zeisel cited in support thereof. The postconviction petitions were denied by the trial court in 1991, so there apparently

quirement, an issue that was raised on direct appeal. See *Collins I*, 478 N.E.2d at 286; CR 76-77. This claim is considered in § III(K) in

27. Collins indicated in his petition that he would subsequently provide a copy of the studies. C 1737. However, neither party has provided a copy of the studies, which apparently are unpublished.

was an opportunity to present the first study in the postconviction proceedings. Even if this claim is not waived because the studies are newly discovered evidence which could not be presented to the Illinois courts because the time for filing a postconviction petition had already expired, see *Harris v. DeRobertis*, 932 F.2d at 621, the claim would fail. The Seventh Circuit has held that the Zeisel studies do not support a claim upon which habeas relief will be granted and, even if the studies did support a cognizable claim, such a claim would be a new rule for which *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 324 (1989), prohibits retroactive application. *Free v. Peters*, 12 F.3d 700, 703 (7th Cir.1993).

Bracy Claim XV and Collins Claims XVI and XVII will be denied.

K. Death Penalty Statute Unconstitutional (B12)

C18-19, C21)

On various grounds, petitioners contend the Illinois death penalty statute, Ill.Rev. Stat. ch. 38 § 9-1 (1977) (now codified as 720 ILCS 5/9-1) is unconstitutional. Only four grounds²⁴ were fairly presented to the Illinois Supreme Court. See *Collins II*, 606 N.E.2d at 1142-43. Additional grounds are contained in the federal habeas petitions. As to those grounds, no ineffective assistance of counsel claim was presented to the Illinois courts. Therefore, only the four claims presented to the Illinois Supreme Court have been preserved for federal habeas corpus review.

[69-73] There is clear authority contrary to the arguments advanced. The Illinois statute does not violate the Constitution by permitting the jury to consider nonstatutory aggravating factors. *Simmons v. South Carolina*, — U.S. —, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994); *Williams v. Chavis*, 945 F.2d at 939; *Silagy v. Peters*, 905 F.2d 995, 1000-01 (7th Cir.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). See also *Tuilaepa v. California*, — U.S. —, 114 S.Ct. 2530, 2538, 129 L.Ed.2d 760 (1994). The

²⁴ In the Illinois courts, they were presented as five grounds, but two of the grounds were found

statute does not violate the Constitution by failing to provide for adequate appellate review. *Silagy*, 905 F.2d at 1000. Nor does the statute violate the Constitution by providing prosecutors with unfettered discretion in pursuing sentences of death. *Williams v. Chavis*, 945 F.2d at 938; *Silagy*, 905 F.2d at 938. The Illinois statute's provisions as to burdens of persuasion and weighing the factors to be considered are not unconstitutional. See *Tuilaepa*, — U.S. at —, 114 S.Ct. at 2538-39; *Williams v. Chavis*, 945 F.2d at 936-37; *Silagy*, 905 F.2d at 938-99. Additionally, that Illinois law as to the burdens of persuasion may have changed over the years, see *Free*, 12 F.3d at 703, does not support an equal protection claim. *Del Vecchio*, 31 F.3d at 1366; *Bowser*, 20 F.3d at 1065-66.

Bracy Claim XII and Collins Claims XVIII, XIX, and XXI will be denied.

L. Trial by Judges who accepted Bribes, Discovery (B10, C24, C31)

Judge Thomas Maloney presided over petitioners' trial. In 1993, Judge Maloney was convicted of accepting bribes to acquit certain defendants. See *United States v. Maloney*, 1994 WL 96673 (N.D.Ill. March 23, 1994) (denying posttrial motions). This included accepting bribes in murder cases. Petitioners allege that, in order to cover up the fact that he accepted bribes from defendants in some cases, Judge Maloney was prosecution oriented in other cases, that is he tended to rule in favor of the prosecution, particularly on discretionary matters. Petitioners allege they were prejudiced by this in that many of the discretionary rulings in this case went against them. There is no allegation that Judge Maloney solicited bribes in petitioners' case. In Collins's supplemental motion for discovery, it is also stated that a government witness in the *Maloney* case informed Collins's present counsel that Collins's counsel at the state trial was a partner of Judge Maloney before he sat on the bench.

In a recently filed second supplementary petition, it is also alleged that Judge Michael Close, who presided over petitioners' post-conviction proceedings, was also bribed. See to be inverse statements of the same ground. See *Collins II*, 606 N.E.2d at 1143.

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conviction proceedings, has accepted bribes from defendants. It is alleged that the "allegations of improprieties concerning Judge Close must call into question whether or not proper discretionary rulings were made in Petitioner's case." C ¶ 820. There is no allegation that Judge Close solicited bribes from petitioners.

[74] Respondents contend that these claims were waived because not presented to the Illinois courts. The claim regarding Judge Maloney was raised for the first time in the reply brief of the postconviction appeal, which is when it first became public information. The Illinois Supreme Court declined to consider the claim. That the Maloney claims are based on newly discovered information constitutes cause for failing to raise it sooner. See *Murray*, 477 U.S. at 488, 106 S.Ct. at 2645. At the time the new information was first discovered, the time for filing a postconviction petition had already expired. See 725 ILCS 5/122-1. There being no direct precedent that the Illinois courts would excuse the delay, it is presumed that no remedy was still available in state court at the time the new evidence was discovered. *Harris v. DeRobertis*, 932 F.2d at 621. Cause exists for failing to present the Judge Maloney claim to the state courts.

[75] The Judge Close claim is different. The allegations of Judge Close's corruption incorporate newspaper articles. See C ¶ 820. As one of those articles states, the allegations against Judge Close first surfaced in 1985. That was before petitioners even filed their postconviction petitions. Therefore, cause does not exist for the delay in raising the Judge Close claim. *Cf. Cornell*, 976 F.2d at 380-81. That claim is waived.

[76, 77] The constitutional right to a fair trial includes the right to a trial judge who is neutral, detached, and free from bias. *Dyars v. Lockhart*, 705 F.2d 993, 995 (8th Cir.1983). Petitioners do not contend that bias can be presumed from the available facts. Instead, they argue that they need further discovery in order to obtain facts that would show the existence of actual bias. It is unclear how petitioners would make such a showing. At oral argument, it was suggested that if would

seek to prove Judge Maloney was tougher in cases where bribes were not paid. That, however, would be insufficient and is only a matter of speculation. As petitioners concede, they are presently incapable of succeeding on the Judge Maloney claims. They do not point to any particular adverse ruling that would have been favorable to them before another judge. Their attack is similar to the position of the petitioner with respect to possible bias of a trial judge rejected by the Court of Appeal, en banc, in *Del Vecchio*, 31 F.3d at 1372 (Easterbrook, J., concurring at 1388-91). The present allegations contain insufficient specificity or good cause to justify further discovery. *Cf. Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir.1994); *Munoz v. Azaue*, 777 F.Supp. 282, 287 (S.D.N.Y.1991).

Bracy Claim X and Collins Claims XXIV and XXXI will be denied. Collins's supplemental motion for discovery is also denied.

M. Fabricated Rope Evidence (C25)

Collins claims that police reports indicate only one piece of rope was recovered from the apartment where the victims had been held. C ¶ 784. However, at trial, two pieces of rope were introduced into evidence. Petitioner contends one or both pieces of rope was fabricated evidence. There is no allegation that the police reports were unavailable at the time of trial. This claim was not presented to the Illinois courts, either directly or as an ineffective assistance of counsel claim. This claim is waived for federal habeas corpus purposes. Collins Claim XXV will be denied.

N. Severance (C26)

Collins complains that the trial court denied his motion to sever his sentencing hearing from that of Bracy. This argument is waived because not raised on direct appeal and no related ineffective assistance of counsel claim was raised in the postconviction proceedings. Collins Claim XXVI will be denied.

O. Nouvell Impeachment Evidence (C28)

It is alleged that the prosecution failed to provide petitioners with information that could have been used to impeach Nowell. This issue was not raised in the Illinois courts and there is no allegation that knowl-

edge of the additional impeachment was not discoverable until after the time for filing a postconviction petition had run. Petitioners, therefore, fail to show cause for failing to present this claim to the Illinois courts. The claim is waived. Collins Claim XXVIII will be denied.

P. Brady Claim Related to Nollum (C30, C37)

[78] Collins alleges that, in May 1983, he first obtained a copy of a January 28, 1981 police report that had not been provided to petitioners at the time of the trial. At that point, it was too late to file a postconviction claim, so petitioners would have cause for failing to present to the Illinois courts any issue based on the police report. Collins contends that this information would be Brady information that should have been disclosed by the prosecution. See *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "A Brady violation occurs where the prosecution suppresses evidence that is favorable to the defendant and material to an issue at trial." *United States v. Carson*, 9 F.3d 876, 882 (7th Cir. 1993). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir.1990) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 106 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))).

Collins alleges that the report contains two pieces of material information. First, he alleges that it refers to only one piece of rope being found, not two. However, in Collins Claim XXV, see § III(M) *supra*, it is alleged that reports revealed there was only one piece of rope. There is no allegation that petitioners lacked access to these other reports at the time of trial. Therefore, having this fact included in an additional report cannot be considered a material fact, nor are the reports necessarily inconsistent as written.

²⁵ This claim was also alluded to in the original

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death sentences were vacated because the trial court had denied defendant's attempts to inform the jury that absent a death sentence, he would be sentenced to life without parole. See *Simmons v. South Carolina*, — U.S. —, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). In the present case, the prosecution argued that petitioners would be dangerous to others at the prison or if they escaped from prison (Tr. 1649-50, 1653); there was never any argument that they would represent a danger if released or paroled from prison. Therefore, being a danger because released on parole was not an issue raised by the prosecution. Also, although the court sustained an objection to Bracy's counsel's reference to petitioners getting natural life or life imprisonment if not sentenced to death, Tr. 1636-37, no objection was made to Collins's counsel's statement that Collins would not be back out on the street in 5 to 10 years if not sentenced to death. Tr. 1642.

Since 1988, Illinois provides for jury instructions as to natural life imprisonment being the alternative to the death penalty, see *People v. Gacho*, 122 Ill.2d 221, 119 Ill. Dec. 287, 306-07, 522 N.E.2d 1146, 1165-66, cert. denied, 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252 (1988). However, this change in practice does not result in an equal protection violation, see *Del Vecchio*, 31 F.3d at 1366; *Bowser*, 20 F.3d at 1065-66.

Collins Claims XXXII, XXXIII, XXXIV, XXXV, and XXXXVII will be denied.

R. Involuntary Confession (B7)

At trial, Bracy was impeached with statements he made to police officers that he had been in the vicinity of Apartment 206 on November 12, 1980. Bracy now alleges that this statement to the police was involuntary in that he was beaten by the police. This claim was not raised in the state courts. Ineffective assistance of trial counsel cannot be cause because this ineffective assistance of counsel claim has not been presented to the state courts. *Murray*, 477 U.S. at 488-89, 106 S.Ct. at 2645-46; *Morris*, 898 F.2d at 1300. Ineffective assistance of postconviction counsel cannot constitute cause. *Coleman*, 501 U.S. at 752-57, 111 S.Ct. at 2566-68; 30. The common law record from the postconvic-

Jenkins, 8 F.3d at 508; *Williams v. Chavis*, 945 F.2d at 932-33; *Bonin*, 999 F.2d at 429. Bracy also relies on Nollum's recent deposition testimony as cause because it purportedly contains new evidence in that Nollum states he saw Bracy being beaten. However, Bracy himself would have known he was beaten, so Nollum's evidence was not needed in order to be able to know the facts necessary to bring the claim.

There being no cause for failing to present the claim to the state courts, Bracy Claim VII will be denied.

S. Impeachment with Silence (B8)

Bracy complains that he was impeached with the fact that, while being interrogated by an assistant State's Attorney, he had not stated that he spent the evening of the murders with his sister. Bracy contends that this constitutes a violation of his right to remain silent. This claim was not presented to the Illinois Supreme Court. Bracy contends that the ineffective assistance of appellate counsel constitutes cause. However, this ineffective assistance of appellate counsel claim was not fairly presented in his postconviction appeal. Therefore, it cannot constitute cause, see *Murray*, 477 U.S. at 489-90, 106 S.Ct. at 2645-46; *Morris*, 898 F.2d at 1300, and Bracy Claim VIII is waived.

Bracy Claim VIII will be denied.

T. Loss of the Common Law Record

[80] Petitioners' postconviction attorney withdrew the common law record from the trial and has not returned it to the courts. This court has ordered postconviction counsel to search for the record, and a rule to show cause is pending as to postconviction counsel. However, he has been unable to locate the missing record. The common law record has been partially reconstructed.

Petitioners refer to the possibility that finding the common law record could reveal additional errors that have not yet been raised. While it might reveal additional errors for petitioners to allege, it is not shown how it would reveal any errors on which relief could be granted. Petitioners have the briefs filed on the direct appeal. Any errors

tion proceedings is not missing.

MEMORANDUM OPINION AND ORDER ON MOTIONS TO ALTER OR AMEND

In the Circuit Court of Cook County, Illinois, Roger Collins and William Bracy were found guilty of murder and other charges and were sentenced to death. The convictions and sentences were affirmed on direct appeal and post-conviction relief was denied. In an order dated August 24, 1994 (the "August Order"), their federal petitions for writ of habeas corpus were denied. Pending are each petitioner's motion to alter or amend the judgment. Also pending is Collins's motion for approval of expenditure of funds to conduct further discovery. The facts of the case are set forth in the August Order and familiarity with that opinion is assumed. Most of petitioners' contentions simply repeat arguments that have previously been considered and rejected. Only new arguments or arguments that were not sufficiently addressed in the August Order will be discussed.

[81] Collins contends in his brief that this court's reading of the entire transcript was insufficient to determine the sufficiency of the evidence because the court did not have the trial exhibits as well. When the motion was presented in court, counsel was asked what the missing exhibits were and was allowed time to provide them for the court's review. At the time the motion was presented in court, counsel referred to one photograph and stated that the exhibits were in the custody of the Cook County State's Attorney. No copy of that photograph nor any other exhibit was filed within the time allowed. The transcript was understandable without the exhibits and Collins does not point to any exhibit for which actual examination is necessary to determine the sufficiency of the evidence. The ruling on sufficiency of the evidence will stand.

[82] Collins has filed a request for approval of funds for his attorneys to travel to Arizona to directly examine documents accumulated by a private investigator for Bracy. The private investigator has primarily been investigating Arizona murder charges

been considered.

IT IS THEREFORE ORDERED that:

- (1) Petitioner Collins is granted leave to file three supplemental habeas corpus petitions in Case No. 93 C 5282. Petitioner's supplemental motion for discovery in Case No. 93 C 5282 [72-1] is denied. Petitioner's motions to order production of exhibits [60-1] and for protective order [61-1] in Case No. 93 C 5282 are denied.
- (2) Respondent's motion to dismiss is granted.
- (3) Petitioner's motion to conduct discovery in Case No. 93 C 5282 is denied.
- (4) The Clerk of the Court is directed to enter judgment in favor of respondent and against petitioner denying the petitions for writ of habeas corpus in Case No. 93 C 5282.
- (5) Respondent's motion to dismiss in Case No. 93 C 5282 is granted.
- (6) Petitioner's motion to conduct discovery in Case No. 93 C 5282 is denied.
- (7) The Clerk of the Court is directed to enter judgment in favor of respondent and against petitioner denying the petition for writ of habeas corpus in Case No. 93 C 5282.

1. Collins's supplement to his motion has also

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against Bracy, but also has information related to the Illinois charges against Bracy and Collins. Some of this information was previously considered. See August Order §§ III(B), III(L). Collins provides a statement of the types of documents the private investigator has. Most of it apparently relates to the Arizona charges. While generally describing the documents, Collins makes no specific allegations as to what facts could support a ground for relief. Collins has not shown good cause for permitting further discovery. *Cf. DeLong v. Thompson*, 790 F.Supp. 594, 616-18 (E.D.Va.1991), *aff'd by unpublished order*, 985 F.2d 583 (4th Cir. 1993).

Collins's motion for discovery also contains a transcript of May 1994 testimony of Attorney Greg Owen in the case of *Arizona v. McCull*. Owen was one of the prosecutors in the present case. Collins again points to inconsistencies regarding when Nellum informed the prosecutors of guns being in the lake. These inconsistencies, however, came out at trial. As was previously held, they do not constitute grounds for relief. See August Order § III(C).

[83] Collins contends that it was recently discovered that Nellum had one or two prior convictions that were unknown to petitioners at the time of trial. The prior convictions were mentioned at a June 1991 sentencing hearing on other charges against Nellum. Collins does not explain how this alleged newly discovered evidence would support a claim upon which habeas relief could be granted. Newly discovered evidence that supports a person's innocence is not alone a basis for granting habeas relief. Deprivation of the evidence must also be a constitutional violation. *Herrera v. Collins*, — U.S. —, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993); *Boesman v. Armstrong*, 859 F.Supp. 369, 372 (W.D.Mo.1994). Furthermore, newly discovered impeachment evidence will not support habeas relief. *Boesman*, 859 F.Supp. at 372. There is no contention that the prosecution knew of these convictions at the time of the trial. This allegation of newly discovered evidence does not support a claim.

[84] Collins now clarifies that he is claiming that there is one police report indicating

All other issues raised in Collins's motion to alter or amend and the issues raised in Bracy's motion to alter or amend are adequately addressed in the August Order.

IT IS THEREFORE ORDERED that:

- (1) In 93 C 5282, Collins's motion to alter or amend [85-1,2] and sealed motion for approval of expenditure of funds [91-1] are denied.
- (2) In 93 C 5282, Bracy's motion to alter or amend [58-1,2] is denied.

Dated: November 4, 1994.



CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, et al., Plaintiffs,

v.
Robert MILLER and Ida Miller, his wife,
jointly and severally, Defendants.

No. 93 C 612.

United States District Court,
N.D. Illinois,
Eastern Division.

Oct. 18, 1994.

Multiemployer pension plan and its trustees brought suit against married couple

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

VS

EARL HAWKINS
NATHSON FIELDS

Petitioners.

Post-Conviction
No. 85 C 6555
85 C 7651

RULING ON PETITIONERS'
MOTION FOR
POST-CONVICTION RELIEF

Petitioners, Earl Hawkins and Nathson Fields, pursuant to Sections 122-1 et seq. of the Illinois Code of Criminal Procedure, 725 ILCS 5/122-1 et seq. (West 1994), seek to vacate the judgment of conviction entered against them in the above captioned matter on September 19, 1986. On that date, the petitioners were sentenced to death by lethal injection. Their sentences were imposed upon the court's earlier respective findings of guilty entered upon first degree murder. Ill. Rev. Stat. (1983), ch. 38, para. 9-1-A(1). The court imposed said sentences after: 1) the defendants waived their right to a jury at the first stage of the death penalty hearing, and the court found they were both eligible for the death penalty; and 2) a jury was empaneled to hear aggravating and mitigating circumstances, and concluded that there were no mitigating circumstances sufficient to preclude the imposition of death.

B A C K G R O U N D

Petitioners, Earl Hawkins and Nathson Fields, were prosecuted for their participation in the murders of Jerome "Fuddy" Smith and Talman Hickman on April 28, 1984, in front of a Chicago Housing Authority (C.H.A.) apartment building located at 706 East 39th Street. Hawkins and Fields were members of the El Rukn street gang and Jerome Smith was the leader of the Black Gangsters Goon Squad street gang.

At trial, the State presented the testimony of six witnesses. Three of these witnesses claimed to have observed the shooting, two other witnesses were police officers and the remaining witness was an El Rukn. Defendant Hawkins was represented by William Swano. Defendant Fields also had a private attorney. The defendants called four witnesses who claimed that they observed the shooting. The defendants also called a Chicago police detective and a private investigator hired by William Swano.

Following closing arguments, Thomas J. Maloney found the defendants guilty of the murders of Jerome Smith and Talman Hickman. After the State moved for a death penalty hearing, the defendants elected to waive their right to a jury at the first stage of the proceeding. The court then found both defendants eligible based on their murder of two or more persons. A jury was thereafter empaneled to hear evidence in aggravation and mitigation. After the jury found there were no mitigating factors sufficient to

preclude the imposition of death, the trial court sentenced the defendants to death.

Notwithstanding contentions the defendants raised concerning the imposition of their death sentences, the crux of their direct appeal alleged that they were not proven guilty beyond a reasonable doubt.¹ In specific detail, the petitioners asserted that the State's witnesses gave inconsistent, contradictory and unbelievable testimony. Petitioners also alleged that the State's three occurrence witnesses were motivated to testify untruthfully by their rival gang affiliation.

The Illinois Supreme Court rejected the petitioners' argument and affirmed their sentences on February 16, 1990. People v. Fields (1990), 135 Ill.2d 18, 552 N.E.2d 791. While the Supreme Court noted that there were discrepancies in the evidence, it could not say that the "trial court's conclusion was so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt as to the defendants' guilt." Fields, 135 Ill.2d at 49. The Supreme Court concluded that the evaluation of the credibility of witnesses, the weight to be given to their testimony, and the inferences to be drawn therefrom were within the province

¹Fields raised two additional challenges to his conviction. One such claim alleged that he was deprived of his right to a trial before an impartial trier of fact. This claim, however, is not germane to the present opinion, and said argument rested solely on statements made by Judge Maloney after he found the defendants guilty.

of the trier of fact. As the trier of fact, it was the trial court's function to assess the credibility of the witnesses and to determine whether there was a reasonable doubt as to the defendant's guilt. In the present case, the trial court obviously chose to believe the testimony of the State's witnesses and not that of the defense witnesses. See Fields, 135 Ill. 2d at 40-49.

On October 1, 1990, the United States Supreme Court denied Fields and Hawkins respective petitions for writ of certiorari. Fields v. Illinois (1990), 498 U.S. 881, 112 L.Ed.2d 182, 111 S.Ct. 227. Hawkins v. Illinois (1990), 498 U.S. 881, 112 L.Ed.2d 182, 111 S.Ct. 228. On November 26, 1990, their respective petitions for rehearing were denied. Fields v. Illinois (1990), 498 U.S. 994, 112 L.Ed.2d 555, 111 S.Ct. 547. Hawkins v. Illinois (1990), 498 U.S. 995, 112 L.Ed.2d 558, 111 S.Ct. 551.

On March 1, 1991 and March 8, 1991, Hawkins and Fields respectively filed petitions for post-conviction relief. Although these petitions raised a number of issues, neither petition alleged that the relevant individual was deprived of his right to a trial before an impartial trier of fact premised upon judicial misconduct.

On June 26, 1991, William Swano, Robert McGee and Thomas Maloney were indicted on charges of racketeering conspiracy, racketeering, and extortion under color of official right. 18 U.S.C. Secs. 1962(d), 1962(c), and 1951. Maloney was individually charged with a fourth count,

obstruction of justice. 18 U.S.C. Sec. 1503. As part and parcel of the three counts common to all individuals, the federal government alleged that Swano paid Maloney \$10,000² to fix the trial of Earl Hawkins and Nathson Fields. Said money was paid by Swano to Maloney's "bagman", McGee, in order to assure the acquittal of the defendants in a joint bench trial. As part of the conspiracy count, the government contended that the money was retained during the trial by Maloney and McGee until such a time where Swano presented evidence "which would make it appear plausible for...Maloney to enter a judgment of acquittal in the case." Maloney subsequently returned the \$10,000 to Swano "in order to cover up and conceal original payments of the bribe."

Prior to the commencement of the trial of Thomas Maloney and Robert McGee, William Swano pleaded guilty to racketeering and agreed to testify against his co-defendants. Another key prosecution witness who would be called during the course of said trial was petitioner Earl Hawkins. The damaging testimony of Hawkins and Swano was corroborated through the testimony of other witnesses, and by evidence of FBI surveillance, recorded telephone conversations, telephone records, and a videotaped conversation. Thomas Maloney did not testify on his own behalf. On April 16, 1993, the jury convicted Thomas

²The indictment also charged that four other bribes were committed.

Maloney of all four charged counts. The jury specifically found that Maloney had engaged in acts of racketeering and had conspired to commit extortion when he accepted and later returned a \$10,000 bribe in the trial of Earl Hawkins and Nathson Fields.

Based on the jury's verdict, the following facts were established during the trial of Thomas Maloney. The potential bribe was first discussed between Swano and Hawkins in either December 1985 or January 1986. Hawkins later contacted Alan Knox, who spoke with the El Rukn leader, Jeff Fort, who approved the potential bribe. Around the same time, January or February 1986, Swano met with McGee to see if Maloney would take a bribe in the relevant case. Swano suggested that he could probably get \$10,000 from the El Rukns. (From similar previous dealings with Maloney, Swano knew to contact McGee.) Shortly thereafter, McGee got back to Swano and told him that Maloney had agreed to take \$10,000 for the fix. Swano subsequently told the El Rukns that the judge would need \$20,000.³ The trial of Hawkins and Fields was continued a number of times due largely in part to Swano's inability to obtain the bribe. After wrangling with the El Rukns, Swano received \$10,000 on June 17, 1986. Alan Knox had brought the money to the courthouse and passed it to Swano at the public defender's

³The defense's theory at trial was that Swano and others had operated a scam known as "rainmaking," where the participants would never pass the alleged bribe along to the judge.

office. The bench trial of Hawkins and Fields had begun earlier that day. Later that evening, Swano gave the bribe to McGee at Mayor's Row restaurant. On June 19, 1986, at approximately 11:30 a.m., McGee called Swano in the anteroom outside Judge Maloney's chambers and informed him that he needed to "give the books back that he had given him the other day." Swano understood this to mean that the fix was off. However, after Swano placed a few phone calls to McGee, he was able to successfully convince McGee, and apparently Maloney, to continue the fix. Swano told Hawkins about the problems he was having with the bribe. The trial ended on June 26, 1986. Judge Maloney told the parties he would make his findings the next day. Later that evening, McGee called Swano and told him that the judge could not go through with the fix. When Swano went to the courtroom the next morning, Maloney handed him the file folder of money Swano had passed to McGee. Hawkins and Fields were thereafter found guilty.

During his testimony at the Maloney trial, Hawkins stated that in 1987 he spoke with prosecutors from the Cook County State's Attorney's office. Hawkins told the jury he had met with the Assistant State's Attorney who prosecuted him in the Smith and Hickman murder case. Hawkins also met with Assistant United States Attorneys and F.B.I. agents. The discussions with the State and federal prosecutors included information Hawkins had not only about Thomas J. Maloney, but also about other members of the El Rukn street

gang. Hawkins testified he had reached a plea agreement with both the federal government and the state's attorneys' office. Regarding his agreement with the federal government, Hawkins will begin serving a sentence of sixty years after he has completed his State sentence.

On September 8, 1992, Nathson Fields filed his "first amended petition for post-conviction relief." Therein, he alleged, among other claims, that he was denied his right to trial before an impartial trier of fact. The petition specifically mentioned that Judge Maloney had recently been indicted for accepting and then returning a bribe in his cause. On April 17, 1996, Fields filed a motion for judgment on his claim that he was denied a trial before an impartial trier of fact.

On April 17, 1996, Earl Hawkins filed his "first amended petition for post-conviction relief." Among his claims, Hawkins, like Fields, contended that he was denied his right to a trial before an impartial trier of fact. Hawkins also averred that he was denied his right to effective assistance of counsel because William Swano "engaged in improper conduct relating to bribing [Judge] Maloney."

On May 29, 1996, the State filed a motion requesting that the court deny the petitioners' requests for post-conviction relief. The State's argument was threefold: 1) that the petitioners' claims were waived; 2) that they actively participated in the corrupt conduct; and 3) that

the petitioners suffered no actual judicial bias from Judge Maloney.

The petitioners filed reply memoranda on July 26, 1996. In his pleading, Fields repeatedly denied that he or his trial counsel knew of the \$10,000 bribe that Swano had passed to Maloney. (On August 28, 1996, Fields' trial attorney filed an affidavit attesting to this lack of knowledge.)

On August 6, 1996, arguments were made by the parties. During the course of this hearing, Fields filed the trial transcript of United States v. Maloney, 91 CR 477 and specifically requested that it was made a formal part of the record. The State did not object to its introduction.

ANALYSIS

Having had the opportunity to evaluate: the relevant pleadings; the applicable case law; and the trial transcripts from the federal prosecution of Judge Maloney, and the state cases of Earl Hawkins and Nathson Fields, this court concludes that an evidentiary hearing is unnecessary. The court has everything it needs to rule on the allegations of the petitions.

The Post-Conviction Hearing Act does not require a trial judge to conduct an evidentiary hearing. The Act gives the post-conviction judge broad discretion as to the type of evidence he or she may consider in ruling on the allegations of the petition. People v. Griffin (1992), 148

Ill.2d 45, 53, 592 N.E.2d 930. Likewise, a judge has wide discretion to limit the type of evidence to be considered in determining the merits of a post-conviction petition. People v. Montgomery (1994), 162 Ill. 2d 109, 113, 642 N.E.2d 1260. Regarding the disposition of a petition in the trial court, 725 ILCS 5/122-6 states in relevant part: "the court may receive proof by affidavits, depositions, oral testimony, or other evidence." Where a defendant's petition presents a question of fact based on the record, an evidentiary hearing should be held, however, where the trial court has everything before it which is needed to rule on the post-conviction petition, then no evidentiary hearing is required. People v. Reed (1st Dist. 1980), 84 Ill.App.3d 1030, 1040, 405 N.E.2d 1065. A trial court may render its decision on a post-conviction petition on the basis of what is contained in the pleadings to which a motion is directed, as well as transcripts of the trial or other proceedings. People v. Adams (1st Dist. 1974), 22 Ill.App.3d 709, 318 N.E.2d 68 (per curium).

The United States Supreme Court has long held that an individual is entitled to fair trial before an impartial trier of fact. Tumey v. Ohio (1927), 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437; In re Murchison (1955), 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623; Mayberry v. Pennsylvania (1971), 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499; Ward v. Monroeville (1972), 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct.

80; Aetna Life Insurance Co. v. Lavoie (1986), 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580.

In Tumey, 273 U.S. at 523, the Supreme Court held that the mayor of a village, who served in a quasi judicial capacity, had a "direct, personal, pecuniary interest" in convicting a defendant who came before him for trial, where the mayor received twelve dollars of the costs imposed in his behalf. The mayor would not have received said sum had the defendant been acquitted. The court reasoned that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

Although there were no allegations of judicial impropriety in Tumey, and the court was cognizant that there were "doubtless mayors who would not allow such [] consideration...to affect their judgment" the requirement of due process of law in judicial procedure was not satisfied. Hence, the Supreme Court opined:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. 273 U.S. at 532.

In Ward v. Village of Monroeville (1972), 409 U.S. 57 the court determined that an Ohio mayor was not an impartial

trier of fact where a major part of the village income was derived from fines, forfeitures, costs and fees imposed by him when he sat as a judge. Although the mayor did not have a personal financial interest in the outcome of each proceeding, the "possible temptation" existed. The mayor's executive responsibilities for village finances might have affected his ability to fairly assess fines and costs. The two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involved a lack of due process of law in the trial of defendants charged with crimes before him. 409 U.S. at 60.

In Aetna Life Insurance Co. v. Lavoie (1986), 475 U.S. 813, 824, the Supreme Court held that an Alabama Supreme Court justice had acted as a "judge in his own case" where he had participated in a case where the decision directly affected a case that the justice had independently filed. The justice's interest was found to be "direct, personal, substantial and pecuniary." (The justice was the author of the opinion and he also cast the decisive vote in a 5 to 4 decision. 475 U.S. at 828.)

The Supreme Court, however, made clear that it was not required to decide whether in fact the justice was influenced, but only whether sitting on the case "would offer a possible temptation to the average...judge to...lead him not to hold the balance nice, clear, and true." 475 U.S. at 825 (citations omitted). Accordingly, Aetna found:

The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do

their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'". 475 U.S. at 825 (citations omitted).

Considering the holdings of Tumey, Ward, and Aetna this court concludes that the petitioners were denied a fair trial before an impartial trier of fact. There the Supreme Court found that the judicial officers had a financial interest in the proceedings for which they were presiding. The court rendered the decisions without making any determination of judicial impropriety. The same cannot be said for the conduct of Judge Maloney. His actions were far more egregious. Maloney was convicted for accepting and then returning a bribe in this very cause. He is currently in federal custody serving a sentence for that conviction. Although the judicial officers discussed above had a pecuniary interest in reaching a certain decision, by doing so they did not commit any illicit or illegal acts. Nor were they predisposed to rule a certain way before they heard a scintilla of evidence, by agreeing to "fix" the case. Not only did Judge Maloney have a "direct, personal, substantial, pecuniary interest" in the trial of Hawkins and Fields, justice did not satisfy "the appearance of justice" by the farthest stretch of one's imagination. Accordingly, petitioners Hawkins and Fields were deprived of their respective rights to due process of law.

Having determined that the petitioners were denied a fair trial before an impartial trier of fact, consideration

will now be given to whether: 1) the petitioners waived their rights; 2) Hawkins forfeited said right by actively participating in the bribe; and 3) the petitioners must establish actual bias by Judge Maloney during the course of their trial.

The State cites People v. Titone (1992), 151 Ill.2d 19, 600 N.E.2d 1160 to support the first point of its threefold argument. Dino Titone was indicted on numerous charges stemming from his participation in two murders. He waived his right to a jury trial and received a bench trial before Judge Maloney. He was subsequently convicted of all charged counts and was sentenced to death. His convictions and sentences were affirmed on direct appeal. After Titone's writ of certiorari was denied by the United States Supreme Court, he filed a petition for post-conviction relief. In this petition, Titone alleged for the first time, that his father paid Titone's trial counsel an extra \$10,000 which was to be used to pay Maloney to fix the case. The trial court dismissed this portion of the defendant's petition. The Illinois Supreme Court affirmed and found that Titone had waived the claim since he had not raised the issue of judicial prejudice on direct appeal. It reasoned that Titone had been put on notice that the alleged bribery scheme was unsuccessful when he was convicted and sentenced to death. Titone, 151 Ill.2d at 29.

Notwithstanding Titone, application of the waiver rule is not a jurisdictional or absolute bar to review of

procedurally defaulted claims, rather it is a rule of administrative convenience. People v. Owens (1989), 129 Ill.2d 303, 317, 544 N.E.2d 276. Recently, People v. Whitehead (1996), 169 Ill.2d 355, 371-372, 662 N.E.2d 1304 enunciated "three well-established exceptions" to the bar of waiver. Strict application of res judicata and waiver will be relaxed where: 1) fundamental fairness so requires; 2) the alleged waiver stems from incompetency of appointed counsel on appeal; and 3) the facts relating to the the claim do not appear on the face of the original appellate record and could not have been supplemented to that record under Supreme Court Rule 329.

Exceptions one and three apply here. Given the finding that the petitioners were denied an impartial finder of fact, the fundamental fairness exception is evident. Moreover, for the State to contend that the petitioners waited approximately ten years to bring this action is somewhat misleading. Although the petitioners have not previously made these actions "known to any court," Earl Hawkins began cooperating with the state and federal governments as early as 1987. At that time, Earl Hawkins specifically discussed his knowledge of Judge Maloney's involvement in the fix of the Smith and Hickman murder case.

Regarding the other applicable exception, Whitehead, 169 Ill.2d at 372 provided the following clarification:

...it is not so much that a claim "could not have been presented" or "raised" by a party on direct appeal, but rather that such a claim could not have been considered by the reviewing court

because the claim's evidentiary basis was de hors the record.

The foregoing explanation is of paramount importance to the present proceeding. The convictions and sentences of Hawkins and Fields were affirmed on direct appeal by the Illinois Supreme Court on February 16, 1990. Judge Maloney was not indicted until June 26, 1991, more than sixteen months later. Using these dates as general guidelines, the issue of the then alleged bribe was clearly not available for appellate review. Hence, the rule of "administrative convenience" is not appropriate under the unique circumstances here.

The State next contends that the petitioners forfeited their right to a trial before an impartial trier of fact because they actively participated in the corrupt conduct they now protest. The State propounds that "[The petitioners] want the best of both worlds, i.e., to attempt to influence to influence the fact finder and then when that fails, to request another chance and blame the fact finder they chose."

This court agrees with the general proposition that those who attempt to corrupt the judicial system may not later hide behind the very constitution they subvert. United States v. Forrest (5th Cir. 1980), 620 F.2d 446, 456-459, however, directly addressed the instant public policy concern. In Forrest, after all the evidence had been heard but prior to final arguments and charges to the jury, the judge was informed of an attempt at jury tampering. A

juror was dismissed and replaced with an alternate when she confirmed that she had been contacted by an acquaintance of the defendant's wife. The defendant and his wife were co-defendants in this matter. The defendants were both found guilty. On appeal, the Forrests contended that they did not receive a trial by a fair and impartial jury. When the circuit court evaluated their claims, it found that it made no difference that it was Forrest himself who had initiated the contact that may have poisoned the jury. The court specifically rejected the suggestion that Forrest could not be heard to complain of the results of his own misconduct. The court was further cognizant and discounted criticism that its holding would encourage defendants to tamper with juries. It did not believe that their holding would furnish defendants with a "heads - I win, tails - you lose" proposition; a successful effort secures an acquittal, an unsuccessful effort secures reversal on appeal. The defendants could be prosecuted and punished for jury tampering.

The court finds the logic of Forrest to be persuasive and will adopt and follow its reasoning. Thus, the claims of petitioners Hawkins and Fields are not barred by their participation in the bribe of Judge Maloney. Hawkins concedes his involvement in said illegal conduct while Fields denies knowledge of the fix. Regardless of what the defendants claim, the State could have charged them with bribery. Although punishment for bribery may seem

infinitesimal contrasted with the ultimate penalty, the applicable classification of crimes is not a function of the judiciary. Where surrender of a fundamental constitutional right is concerned, the court's inquiry cannot be focused upon the "clean hands" of the defendant. Zilich v. Reid (3rd Cir. 1994), 36 F.3d 317, 321 (case remanded for evidentiary hearing on voluntariness of defendant's guilty plea where defendant alleged he was promised a sentence of probation in exchange for \$4,000 bribe to trial judge).

The State relies on the test enunciated in People v. Titone (1993), 252 Ill.App.3d 682, 625 N.E.2d 172 and followed in People v. Knade (1st Dist. 1993), 252 Ill.App.3d 682, 625 N.E.2d 172 to support the third component of its threefold argument, that actual judicial bias must be established. Titone adopted a two-prong test originally provided in Commonwealth of Pennsylvania v. Shaw (1990), 398 Pa.Super.341, 508 A.2d 1379 which held that:

"...in order to support a claim of judicial bias, two requirements must be met: (1) the petitioner must establish a nexus between the activities being investigated and the trial judge's conduct at trial; and (2) the petitioner must allege and establish actual bias resulting from the trial judge's extrajudicial conduct." 151 Ill.2d at 30.

This court finds that the preceding test is not controlling. Not only are Titone and Knade factually distinguishable, the test adopted therein was adopted under a different milieu.

Titone and Knade both dealt with situations where there were only allegations of bribery. In Titone, the

defendant's father stated in an affidavit that he paid his son's trial counsel an additional \$10,000 that was to be used to pay Judge Maloney to fix the case. In Knade, the defendant's ex-wife attested that prior to sentencing, she saw the judge having a conversation in his chambers with the victim's son and a police officer. She next observed the officer hand the judge a brown manila envelope. In both cases the respective reviewing courts found there was no evidence of judicial impropriety. Knade, 252 Ill.App.3d at 690 (mere speculation was insufficient); Titone, 151 Ill.2d at 29 (no direct evidence was presented that Judge Maloney solicited, received, or agreed to accept a bribe to influence his decision in the defendant's case). Similar statements cannot be made for the bench trial of Hawkins and Fields. Judge Maloney was found guilty beyond a reasonable doubt by a federal jury for agreeing to fix the petitioners' cause.

Additionally, this court must consider and evaluate the context under which Titone adopted Shaw. At the time Titone's post-conviction petition was being evaluated, Judge Maloney was under investigation for judicial impropriety in nonrelated cases. Titone, 151 Ill.2d at 29 found that this concern was not germane to Dino Titone's contentions; it could not serve to taint all other decisions with which Judge Maloney had been involved.

It is a misstatement of law and fact to contend that the petitioners may have made a preliminary showing in

regard to the first prong of Titone. Guilt proven beyond a reasonable doubt clearly supersedes establishing "a nexus between the activities being investigated and the trial judges conduct at trial."

Furthermore, to hold the petitioners bound by the second prong of Titone under the unique facts of this case, is clearly inappropriate. Inasmuch as the bribe has been established, the second prong is accordingly not applicable.

Moreover, the State's reliance on Branion v. Gramly (7th Cir. 1988), 855 F.2d 1256 for the proposition that the defendant did not establish prejudice is misplaced. In Branion, due to limitations, the issue could only be considered under habeas corpus if the defendant could establish both "cause" and "prejudice." Branion, 855 F.2d at 1267. There, after learning of the judge's intention to enter post-conviction relief in exchange for a bribe, the prosecutor convinced the judge not to enter said order. Evaluating Branion's prejudice component, the reviewing court concluded that the defendant had not established a violation of a constitutional right. Neither the right to have the judge act as a "thirteenth juror" and substitute his judgment for that of a jury, nor the right to a corrupt acquittal, established constitutional prejudice. The relevant ex parte communication only deprived Branion of an entitlement under state law. Branion, 855 F.2d at 1268.

Earl Hawkins and Nathson Fields, however, were deprived of a constitutional right. In all criminal prosecutions the accused is entitled to a fair and impartial trial by jury. People v. Marino (1953), 414 Ill. 445, 450, 111 N.E.2d 534. The right of a defendant to an unbiased, open-minded fact finder is so fundamental to our system of jurisprudence that it should not require either citation or explanation. People v. Eckert (5th Dist. 1990), 194 Ill.App.3d 667, 673, 551 N.E.2d 820.

In People v. Aleman (1st Dist. 1996), ___ Ill.App.3d ___, 667 N.E.2d 615 the appellate court found that double jeopardy did not shield a subsequent prosecution where the earlier acquittal had been procured through a bribe. The constitution demanded fairness not only for the accused but, also, for the accuser. By bribing the judge, Aleman prevented a fair resolution of the first proceeding. Aleman, ___ Ill.App.3d at ___. Fairness is also mandated in the present proceeding. Even if the State could show through the testimony of Judge Maloney and others that Maloney returned the bribe because the defense evidence was not there, principles of fairness require more. Justice must satisfy the appearance of justice. Aetna, 475 U.S. at 825.

The petitioners here were denied a trial before an impartial trier of fact. Said right is rooted in the constitutional guaranty of due process of law and entitles a defendant to a fair and impartial trial before a court which

proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial. People v. McDaniels (5th Dist. 1986), 144 Ill.App.3d 459, 462, 494 N.E.2d 1275; City of Chicago v. Cohn (1927), 326 Ill. 372, 374, 158 N.E. 118. If this most basic and fundamental right has not been afforded a defendant during trial, then that defendant has been denied due process of law and is entitled to a new trial. McDaniels 144 Ill.App.3d at 462. Accordingly, the convictions and sentences of Earl Hawkins and Nathson Fields are vacated, and the petitioners are granted a new trial.

C O N C L U S I O N

Based on the foregoing discussion, the sentences and convictions of the petitioners are hereby vacated and they are accordingly granted a new trial.

ENTERED:

Deborah Mary Dooling
Judge of the Circuit
Court of Cook County
Criminal Division

DATED: September 18, 1996